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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment allows a public school to engage in viewpoint discrimination against a teacher's classroom display of noncurricular materials when a school practice or custom permits such displays?

2. Whether the Court of Appeals erred in applying the "curriculum" test set forth in *Hazelwood Sch. Dist. v. Kuhlmeier* to circumscribe constitutionally protected expression by a teacher where a public school system by practice and custom allows broader limits for such expression?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is William Lee, a public school teacher and resident of the Commonwealth of Virginia.

Respondents who were Defendants-Appellees in the court of appeals below are: (1) York County School Division; (2) Steven R. Staples, in his official capacity as Superintendent of the York County School Division; (3) York County School Board; and (4) the members of the York County School Board, including R. Page Minter, Barbara S. Haywood, Linda Meadows, Mark A. Medford, and Barrent M. Henry, each of whom is sued in his or her official capacity.

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INTRODUCTION

This case arises from the discriminatory removal of noncurricular materials posted in a public school classroom. Although schools need not necessarily permit the posting of materials of personal and public interest on classroom walls, when as a matter of practice they do, as in this case, censorship based on viewpoint is prohibited. Here, York County Principal Crispin Zanca removed newspaper clippings and other materials posted by teacher William Lee in his Tabb High School classroom ostensibly because of their religious content. However, Zanca chose not to remove a photograph of three scouts praying together, and a picture of a uniformed military member wearing a helmet with the

imperative: "Pray for America." The latter two photos were allowed to remain because of Zanca"s admitted emotional connection with the 9-11 tragedy (for which the scouts were praying) and because 47% of his school"s student population were in one way or other affiliated with the Armed Forces.

The courts below failed to overturn the discrimination reflected in Zanca's personal predilections because the applicable jurisprudence in this area of the law is beset by conflicting and varying standards that do not properly account for the special characteristics of the school environment. On the one hand, courts pay obligatory lip service to broad generalizations about First Amendment rights being "available" to teachers in light of the special characteristics of the school environment (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). On the other hand, they allow little, if any, quarter to free speech interests, applying a variety of legal analyses that inexorably find *all* classroom speech to be unprotected by virtue of the employer-employee relationship or under the rubric of "school sponsored" speech. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Neither do courts adequately account for the special characteristics of the school environment which requires a more specialized analysis than the cookie-cutter doctrines of traditional employment law when it comes to teacher expression. *Morse v. Frederick*, 551 U.S. _____, Dkt. No. 06-278, at 8-9 (June 25, 2007); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

The present case presents an opportunity for this Court to clarify conflicting standards among the circuits and to address whether school administrators may engage in unrestrained viewpoint discrimination against teachers

when by practice and custom other teachers are permitted to exercise noncurricular speech in the classroom.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (by King, J., joined by Shedd, J., and Hamilton, S.J.) is reported as *Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007), and is set forth in the Appendix beginning at A-1. The opinion of the United States District Court for the Eastern District of Virginia (by Smith, J.) is reported as *Lee v. York County School Division*, 418 F. Supp. 2d 816 (E.D. Va. 2006), and is set forth in the Appendix beginning at A-27.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit, which is the subject of the instant Petition, was entered on May 2, 2007 (A-1). This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1, provides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

STATEMENT OF THE CASE

Since the year 2000, Petitioner William Lee has been employed as a teacher by Respondents York County School

Division and York County School Board. JA 40-41.[1] In 2002, Lee was assigned to teach Spanish at Tabb High School, a public school within the York County School Division operated and controlled by the Defendant School Board. Crispin Zanca was employed by the Respondents as the principal of Tabb High School. JA 137.

Principal Zanca implemented a practice and custom at Tabb High School of permitting teachers to post on the walls or other areas within the classroom assigned to the teacher written or graphic materials that (1) related to the subject matter taught by the teacher, (2) were of personal interest or importance to the teacher, or (3) related to current events. JA 30, 258-60; (A-5). Zanca and Superintendent Stephen Staples confirmed Zanca's custom and practice of permitting posted materials that did not relate to courses taught by teachers JA 140-41, 258; (A-52, 53, 54). Specifically, Superintendent Staples, as Defendants' Fed. R. Civ. P. 30(b)(6) designee, testified as follows:

> Q. My understanding is that teachers are allowed to place things on their bulletin boards and walls that aren't necessarily curriculum related, is that correct?
>
> A. That's my understanding of the practice.
>
> * * * *

[1] The Fourth Circuit record includes the Joint Appendix filed by the parties in the Court of Appeals. Relevant facts set forth in the Statement of the Case are supported by citations to the Joint Appendix and denominated "JA," followed by the page number.

> Q. The practice has allowed people to post materials of personal interest on their walls and bulletin boards?
>
> A. As long as they didn't violate the law, yes.

JA 258-59. Significantly, no restrictions, standards, or guidelines were even promulgated by the Appellees or verbally communicated to the teachers of Tabb High School. JA 21, 243, 257. It was freely admitted that family pictures, current events articles, sports figures and materials, human interest articles, and materials of personal interest were allowed for display by teachers at Tabb High School. JA 258-60. Zanca further admitted that teachers were given no guidelines, and he stated with respect to materials dealing with religion that "there are things that are allowable and things that probably cross the line and are not permissible." JA 141-42.

Zanca's practice arose from the Defendant School Board's policy of granting principals broad discretion in determining what materials could be displayed in school classrooms. JA 30, 141-42. Superintendent Staples confirmed that (1) there were no standards establishing the grounds or basis for the removal of materials from classroom walls or bulletin boards that had been posted by teachers under the aforementioned policy, and (2) the removal of materials on display in teachers' classrooms was left to the discretion of school principals like Zanca. JA 21, 243-44, 257.

Pursuant to the school's policy and practice, Lee posted in his classroom written and graphic materials that were of personal interest or importance to him or related to current events or the subject matter he taught at the school. JA 49-50.

Some of the materials posted by Lee described or depicted religious aspects of events of current or historical interest. JA 247.

Sometime in October 2004, Dr. Judy Davis-Dorsey, an employee of Defendant York County School Division, received a phone call in which the caller expressed concern that materials posted in Lee's classroom contained religious content. JA 271-72. Davis-Dorsey called Dr. Carl James, the School Division's director of school administration, who then contacted Zanca, advised him of the nature of the report, and asked Zanca to look into the matter. JA 159.

Zanca went to Lee's classroom on a day Lee was absent from school because of illness. JA 60, 160. Zanca inspected the materials and concluded that the following materials must be removed because they contained religious content:

> a) a *USA Today* news article titled "White House Staffers Gather For Bible Study" detailing then-Attorney General John Ashcroft's participation, while serving as Attorney General of the United States, in prayer meetings and Bible studies with staff members, JA 265 (A-66);
>
> b) a *Daily Press*[2] news article titled "The God Gap" describing the different life philosophies of the 2004 Presidential candidates George Bush and John Kerry and displayed by Lee in the midst of the then-

[2] The *Daily Press* is a local paper of general circulation for the Hampton Roads, Virginia, area.

> current 2004 Presidential campaign, JA 126-30 (A-67);
>
> c) a Peninsula Rescue Mission news article concerning Roni Bowers, a local girl who had been killed when the plane she was flying in was shot down mistakenly in Latin America, which was connected to a *Daily Press* news article regarding the same incident, JA 264, 266 (A-68, 69); and
>
> d) a poster concerning the Presidentially proclaimed National Day of Prayer recognized by Congress in 36 U.S.C. § 119 and depicting George Washington praying. JA 261; (A-70).

(A-4, 5). Zanca placed the removed materials on Lee's desk in an office shared with other teachers and left a note in Lee's mailbox. JA 160. Zanca testified that he did not read the entirety of any of the articles he removed. JA 162; (A-6). These items were but a few of many articles and postings and represented a minor portion of wall space in Lee's classroom.

Zanca viewed, but did not remove from display, a picture of three Boy Scouts praying in front of an American flag (A-6, n. 6; A-64), and a photograph displaying a member of the United States military with the words "Pray for America" and an American flag on his helmet (A-65). Zanca later explained in deposition testimony that he recognized the Scouts were praying, but because the caption underneath the picture mentioned 9/11, "[s]omething a little emotional for a lot of us that are still there," he decided to leave it up. JA 196. Zanca said he "did not see it as a religious poster even though they are praying." JA 198.

Zanca also viewed, but did not remove, the photograph of a military person with the message "Pray for America" on his helmet (A-65) because "I . . . knew that close to 47% of my student population in one way or other have Armed Forces ties. . . . I'm sure that had a bearing on my decision to leave it, even tough the word 'pray' is on there." JA 199. He elaborated: "I probably thought it was very nebulous whether [the photo] did or did not [violate the Establishment Clause] and in light of the population in the community that I serve, I decided to leave it up." JA 200.[3]

When Lee returned to work, he discovered the removed materials. He asked Zanca about the removal and was told that a complaint had been received and that Zanca felt certain things had to be taken down because they were inappropriate in a Spanish classroom. JA 164. Zanca indicated that he selected the removed materials because the materials contained references to religion. JA 147, 152-56. Zanca also repeatedly testified that the materials he removed were not curricular in nature. JA 146-47, 155, 162, 164, 168, 172-73, 177, 179, 182, 186; (A-41, n. 18).

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[3] Zanca also allowed other varied items to remain on the classroom wall relating to the following: the religious festival of Rinti Raymi that is celebrated in the City of Cuzco in the mountains of Peru, JA 78; a tourist poster concerning the highlands near the Peru-Bolivia border and depicting a famous building in the City of Cuzco, JA 81; a child's game for the conjugation of verbs in Spanish, JA 84-85; an advertisement for bullfights and Mexican "ho-downs," JA 85; a tapestry depicting a Tumi, a device used by the high priests of the Inca civilization, JA 87; National Geographic articles concerning Inca mummies, JA 89, 91-92; depictions of a pastoral setting in the South American highlands, JA 93; and a poster depicting Christopher Columbus' ships, JA 97.

Lee then sought guidance from legal counsel who, in a letter to School Superintendent Staples, raised objections to the removal of the materials and requested that Lee be allowed to repost the removed materials. Staples provided this letter to the Defendant School Board in early January of 2005. JA 255. In a letter from the county attorney, Lee's request to repost the materials was denied on grounds that the removed materials were "overtly religious[.]" JA 33-34. This decision not to allow the materials to be reposted was approved and ratified by the Respondent School Board. JA 256.

Lee thereafter filed suit alleging that the removal of the materials from his classroom walls and prohibition upon reposting them violated his rights to free expression under the First Amendment and his right to equal protection of the law under the Fourteenth Amendment.

On cross-motions for summary judgment, the District Court entered an order and judgment granting the Respondents' motion and denying Lee's (A-27). In its written opinion, the District Court first held that under the decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998), any teacher expression that is curricular is, by definition, not on a matter of public concern and thus unprotected by the First Amendment. Although recognizing that both Lee and Zanca had testified that Lee's postings were not curricular in nature, the District Court ruled that Lee's postings were nevertheless curricular because they were part of his methodology of instruction (A-41) and so, under *Boring*, the postings were wholly unprotected by the First Amendment.

The District Court also made alternative rulings that (1) none of the posted materials related to matters of "public concern" (A-46), (2) no forum for expression existed at Tabb High School with respect to teacher expression by posting materials in classrooms (A-51, 55), (3) the lack of any standards guiding Zanca in determining what materials can and cannot be posted did not violate the First Amendment (A-57), and (4) any viewpoint discrimination resulting from the removal of only materials with religious themes was irrelevant because the expression was not protected by the First Amendment (A-57, 58).

On appeal, the Court of Appeals for the Fourth Circuit affirmed on the sole basis that Lee's postings were unprotected curricular speech (A-20). While recognizing that under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), teachers do not "shed their constitutional rights at the schoolhouse gate," the Court of Appeals ruled that the rights of Lee and other teachers are limited because of their status as public employees, relying on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Under that precedent, the speech of a public employee is protected by the First Amendment only if the speech relates to a matter of public concern and the employee's interest in First Amendment expression outweighs the employer's interest in the appropriate operation of the workplace (A-13).

Although the Court recognized that Lee's postings, which concerned the religious beliefs and philosophies of Presidential candidates George W. Bush and John Kerry, the activities of Attorney General John Ashcroft, and the tragic death of a local youth while on a foreign mission, normally would be considered as relating to matters of public concern

(A-14, 15), under Circuit precedent established by *Boring*, a teacher's expression that relates to school curriculum is by definition not considered to be on a matter of public concern (A-18). "[D]isputes over curriculum constitute ordinary employment disputes and do not implicate speech on a matter of public concern." (A-18).

It then found that Lee's postings were "curricular" speech using the definition of "curriculum" set forth in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), wherein if expression is "school sponsored" and designed to impart particular knowledge to students, it is unprotected (A-19, 23). The Court determined that Lee's speech was "school sponsored" and bore the imprimatur of the school because it was presented within a classroom for viewing by students (A-21, 22).

It went on to find that Lee's postings satisfied the second prong of *Kuhlmeier* because "classroom speech can readily be designed to impart particular knowledge, and yet not otherwise relate to the curricular objectives that a teacher must follow." (A-23). The Court ruled that curricular "has a broader meaning than the name of a particular course of study, or the designation of materials used to achieve specific curricular objectives." *Id.* Lee's postings were thus deemed to be curricular because Lee was responsible for the emotional and moral well-being of students and the postings were intended by Lee to show students political figures who have hopeful social and religious values. The Court found that "[t]hrough these postings, Lee sought to impart the particular knowledge of these figures and their values to his students in order to expose the students to social and moral values he deemed beneficial to their emotional growth." (A-24). In a footnote, the Court dismissed the fact that both Lee

and Zanca had testified that the postings did ***not*** relate to the curriculum on grounds it was "irrelevant . . . because the *Kuhlmeier* definition encompasses more than a subjective view of curriculum." (A-19, n. 15). It also noted that because Lee's expression was wholly unprotected, it did not matter if Zanca's removal of material constituted viewpoint discrimination or if he acted with unfettered discretion in removing the materials (A-25, n. 17).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL REGARDING THE PROPER STANDARDS TO BE APPLIED IN DETERMINING THE RIGHTS OF PUBLIC SCHOOL TEACHERS TO EXPRESSION ON SCHOOL PROPERTY.

In *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, (1969), this Court declared that "[i]t can hardly be argued that either students **or teachers** shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Accord, Morse v. Frederick*, 551 U.S. ___, Dkt. No. 06-278, at 8-9 (June 25, 2007). While student speech has been the subject of no less than four decisions by this Court, no cases concerning the First Amendment protections afforded public school teachers within the confines of the classroom have been decided by this Court.[4]

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[4] In *Givhan v. Western Line Consolidated School District et al.*, 439 U.S. 410 (1979), this Court remanded for further consideration a case involving a teacher who was fired because of several private encounters

The standards applied by lower courts in cases involving teacher speech are conflicting and muddled, producing decisions in the various courts of appeals that are vexingly inconsistent, both as to the scope of the ostensible free speech rights accorded to teachers and the legal analysis of claims of improper censorship of teacher speech. *See California Teachers Assoc. v. State Board of* Education, 271 F.3d 1141, 1148-49 n. 6 (9th Cir. 1999) (Supreme Court has not resolved the protection afforded teacher speech, and the circuit courts have adopted three different tests to analyze the free speech rights of teachers). In addition, the courts have failed to recognize that school divisions have discretion to allow teachers, by policy and practice (as with students and others within the school environment), to exercise free speech rights. Ordinarily, viewpoint discrimination in the application of such governmental policies or practices would be impermissible.

The disparate legal doctrines and confusion in this area of the law result not only from the lack of any definitive Supreme Court precedent but from the fact that public school teachers are public employees. Thus, the Third, Fifth, Sixth, and Ninth Circuit Courts of Appeals have employed the standard analysis for public employee speech set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick*

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with the school principal in which she complained about practices and policies she conceived to be racially discriminatory. This Court ruled that a teacher does not forfeit "his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Id.* at 414. It went on to say: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Id.* at 415-16.

v. Myers, 461 U.S. 138 (1983). *See Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (teacher's manner of conveying the curriculum constituted an ordinary employment dispute and did not involve expression on a matter of public concern protected by the First Amendment); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (teacher's choice of reading list for world history class was not speech on a matter of public concern under *Pickering*); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1050-51 (6th Cir. 2001), *cert. denied*, 537 U.S. 813 (2002) (*Pickering-Connick* analysis applied in determining whether teacher's presentation of speakers on an issue of public concern to class was constitutionally protected speech); and *Nicholson v. Bd. of Educ.*, 682 F.2d 858, 865 (9th Cir. 1982) (the question whether a school teacher's speech is constitutionally protected requires the balancing of interests set forth in *Pickering*).

The First, Second, Seventh, Eighth, and Tenth Circuits employ the "school-sponsored speech" analysis developed in the context of student speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1987) in determining a teacher's right of expression. *See Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (teacher's in-class discussion of abortion in connection with biology instruction was subject to regulation in order to further school's legitimate pedagogical interests); *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 723 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995) (applying *Kuhlmeier*'s "school-sponsored speech" test to claim by guest lecturer that his speech was improperly restricted and censured by school district); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (teacher's claim of a First Amendment right to determine the curriculum

content of his junior high class rejected under the *Kuhlmeier* decision);[5] *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998), *rehearing en banc den.*, 154 F.3d 904 (8th Cir. 1998), *cert. denied*, 526 U.S. 1012 (1999), (school could punish and reprimand teacher for persistent use of reading texts containing profanity; classroom exercises constituted school-sponsored activities subject to regulation for legitimate pedagogical interests); and *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) (rejecting application of *Pickering* test to teacher's First Amendment claim because *Pickering* only addresses the school's interest as an employer, not its interest as an educator).

The Fourth Circuit has established a different mode of analysis as shown by the decision in this case and its previous decision in *Boring*. Here and in *Boring*, the Fourth Circuit held that a teacher's First Amendment claim is judged under the *Pickering-Connick* test. However, the Fourth Circuit considers (as a matter of law) that any First Amendment claim involving "curricular" speech is not speech on a matter of public concern. (A-13, 18). In determining what is "curricular," the Fourth Circuit chooses not to look to the actual curriculum policy, practice, or custom implemented by the school, but as a matter of law to the definition set forth in this Court's *Kuhlmeier* decision (A-17, 19). If the speech fits within the *Kuhlmeier* definition, it is unprotected and subject to viewpoint discrimination.[6]

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[5] Without overruling *Webster*, the Seventh Circuit recently analyzed a teacher's free speech claim under the decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). *See Mayer v. Monroe Cnty. Cmt. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

[6] In the *Cockrel* case, *supra*, 270 F.3d at 1051-52, the Sixth Circuit specifically criticized the Fourth Circuit's *Boring* decision, holding that it extends "the holding of *Connick* beyond what the Supreme Court

Finally, this Court's standards relating to access to school property, though rejected in this case by the Court of Appeals, are nonetheless directly relevant in view of the school's practice of allowing items to be displayed by teachers. *See Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37, 46, n. 7 (1983) (use of teacher mailboxes subject to Free Speech forum analysis); *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (teacher expression on school board business is protected speech).[7] In *Perry*, 460 U.S. at 44, this Court made it clear that:

> The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra,* and on sidewalks outside. *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972). . . . The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

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intended," resulting in "no freedom of speech for teachers when teaching students in the classroom."

[7] *See also, Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (denial of access for after-hours student Bible Club constituted viewpoint discrimination); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (denial of funding of student magazine constituted viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (denial of display of family matters film with religious viewpoint unconstitutional); *Widmar v. Vincent*, 454 U.S. 263 (1981) (denial of access for student Bible study group violated Free Speech rights).

In the Fourth Circuit's *Boring* case, Judge Luttig noted that there may be differences in the protection afforded different types of speech uttered in the classroom. Identifying problems with application of the *Kulhmeier* "curriculum" test to teacher speech, he observed that it:

> fails to recognize the elementary difference between teacher in-class speech which is curricular, and teacher in-class speech which is noncurricular, because it assumes that every word uttered by a teacher in a classroom is curriculum. In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the former context of teacher in-class curricular speech, the teacher equally assuredly does not.

Boring, 136 F.3d at 373 (Luttig, J. concurring).

In the present case, where the school has a practice of permitting certain types of noncurricular speech in the classroom, it is fundamental First Amendment jurisprudence that there can be no viewpoint discrimination. *Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37 (1983); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Moreover, the standards applied in censoring that speech must be reasonable and not based on the unbridled discretion of officials. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 763 (1988)). This Court has also recognized the value of academic freedom (*see Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006)), and lower courts have properly viewed academic freedom as extending to

teachers at the high school level. *Kingsville Independent Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976). It is axiomatic that if schools have granted rights of expression to teachers on noncurricular matters, the light of academic freedom is extinguished if such expression is arbitrarily restricted according to a teacher's viewpoint.

This case presents a clear opportunity for this Court not only to resolve the conflict and uncertainty among the circuits and the unequal application of law to these types of constitutional disputes, but to provide guidance in an area of law in need of clarification.

II. THIS CASE PRESENTS UNRESOLVED QUESTIONS RECOGNIZED IN *TINKER V. DES MOINES SCHOOL DISTRICT*, *CONNICK V. MYERS* AND *GARCETTI V. CEBALLOS* SUGGESTING THAT PUBLIC EMPLOYEE SPEECH ON MATTERS OF OTHER THAN PUBLIC CONCERN ARE NEVERTHELESS PROTECTED BY THE FIRST AMENDMENT IN THE PUBLIC SCHOOL ENVIRONMENT.

As recently as this year, this Court explicitly reaffirmed its pronouncement in *Tinker* that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to **teachers**," and further, that *Tinker* "implicat[es] concerns at the heart of the First Amendment." *Morse v. Frederick*, 551 U.S. ____, Dkt. No. 06-278, at 8-9 (June 25, 2007). When, as in this case, the speech of a public school teacher is made subject to arbitrary viewpoint discrimination and treated differently than the speech of other teachers -- especially where, as here, school

practice and custom permits noncurricular expression by teachers -- a substantial question is presented as to the scope of First Amendment rights for teacher speech in light of the special characteristics of the school environment.

Similarly, in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), this Court held that although a public employee's duties may determine the scope of an employee's First Amendment rights, there may also be additional Free Speech interests involving the rights of teachers in the educational environment.

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

126 S. Ct. at 1962. In the present case, some of Lee's materials related to classroom instruction. Other materials were solely of personal interest. But all of the displayed materials were within the scope of the school's practice and custom allowing teachers to display materials of interest, personal or otherwise. And yet, some of Lee's materials were subjected to indiscriminate censorship based on a policy that permitted the exercise of standardless discretion and failed to restrict the Principal's personal predilections. The special characteristics of the school environment suggest that when the practice of the school is to permit teachers to display items of personal interest, the First Amendment does not

permit administrators to discriminate against teachers based on viewpoint if the speech is otherwise lawful.

In *Connick v. Myers*, this Court clearly confirmed that an employee may have free speech rights in an employment setting that are independent of the employer-employee relationship. It said: "[w]e do not suggest . . . that Myers' speech, *even if not touching upon a matter of public concern*, is totally beyond the protection of the First Amendment. 'The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political.' Great secular causes, with smaller ones, are guarded." *Connick*, 461 U.S. at 147 (*citing United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967), *quoting Thomas v. Collins*, 323 U.S. 516, 531 (1945)). In the present case, the practice and custom of the York County Schools permitted teachers to display materials of current or personal interest, as well as materials related to the course being taught. However, the indiscriminate application of a hybrid *Pickering-Connick-Kuhlmeier* test ignores *Connick*'s clear indication that employee speech on matters of "other than public concern" may still have protection under the First Amendment.

In light of this Court's several expressed reservations in the *Tinker*, *Morse*, *Garcetti*, and *Connick* cases, this case presents a unique record of impermissible viewpoint discrimination under a governmental policy and practice applicable to all teachers. The critical importance of speech in this educational setting requires close scrutiny and fair and equitable treatment as among teachers in the application of school policies. By granting the instant petition, this Court can address and provide guidance on the questions left open in *Tinker*, *Morse*, *Garcetti*, and *Connick*. By reversing the opinion below, it can remedy the discrimination arising from

the standardless discretion exercised by Principal Zanca and confirm that the oft-repeated mantra that "teachers do not shed their First Amendment rights at the schoolhouse door" has substance and is not mere platitude.

III. THE RATIONALE ADOPTED BY THE COURT OF APPEALS LEGITIMIZES VIEWPOINT DISCRIMINATION AND COMPLETELY EVISCERATES ALL FIRST AMENDMENT PROTECTION FOR TEACHERS IN THE CLASSROOM.

The decisions below failed to distinguish between and among the content of the materials that were removed and, instead, painted Petitioner's postings as "curricular" in nature and, therefore, unrelated to matters of public concern and unprotected within the employer-employee relationship (A-20; A-41, n. 18). The Court reasoned:

> [W]hen a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular. This determination— whether the contested speech is curricular in nature — is a question of law for the court.

(A-18, 19). In other words, if Lee's speech is "curricular" in nature, it is by definition not a "matter of public concern" and is, therefore, unprotected. According to the reasoning of the Court of Appeals, the determination of

"curricular" is not decided by reference to any actual school policy or practice defining instruction as "curricular" or "noncurricular," but instead by a strictly judicial definition of "curricular." Thus, unconstrained by the school system's actual policy and practice, the Court determined "curricular" by reference to the definition employed in a student speech case, *Hazlewood v. Kuhlmeier,* which includes any "activities . . . designed to impart particular knowledge or skills to student participants and audiences." *Kuhlmeier*, 484 U.S. at 271.[8] This approach generates a hypothetical construct for "curricular" divorced from any adopted by York County and implemented by Principal Zanca,[9] thereby minimizing (1) the significance of contrary testimony by school officials about the school system's view of curricular and noncurricular and its actual practice of permitting teachers to engage in *noncurricular* speech,[10] and (2) the record evidence that

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[8] The Court of Appeals also reasoned that *Kuhlmeier's* requirement for "faculty supervision" of expressive activities was satisfied because "the classroom bulletin boards and their contents were supervised by the teachers, who were the only persons in the school authorized to post items on the bulletin boards, and by Principal Zanca, who oversaw and monitored all such postings." (A-23). This analysis stretches *Kuhlmeier* beyond its intended limit to only student speech. The *Kuhlmeier* decision was clearly referring to faculty supervision of the activities of third parties, such as students, and not the actions of a teacher in deciding to engage in expression. Teacher expression, as in the case of the Petitioner's postings, is usually not supervised by faculty but is subject only to faculty self-governance.

[9] Under *Kuhlmeier*'s concept of "school-sponsored" expression, the Court of Appeals also avoided traditional understandings of curriculum in the sense of centrally planned, structured standards of learning and courses of instruction that teachers are expected to teach in the course of their assigned duties.

[10] The undisputed and uncontradicted testimony in this case shows that

Lee's expression did *not* in Principal Zanca's view relate to the curriculum.[11] Thus, using *Kuhlmeier's* sweeping definition of curriculum, Petitioner's postings -- which were not done pursuant to a school board prescribed mission or goal, but as expression allowed by school practice -- could instead be characterized by the Court of Appeals as "curricular" and therefore unprotected. Since Lee's speech was unprotected, the Court could then conclude, also "as a matter of law," that the school was not prevented from engaging in unrestrained viewpoint discrimination. (A-25, n. 17). *Quod erat demonstrandum* by a series of "matter of law" determinations that do not admit to any First Amendment rights for teachers in the classroom (or square with a disparate factual record to the contrary).

The syllogistic analysis of the Court of Appeals is reminiscent of another era when judicial constructs

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the school had a policy, custom, and practice of allowing teachers to post in their classrooms materials that were not only related to coursework and current events, but also of *personal interest* to them and not related to the courses taught by teachers. JA 30, 140-41, 258; (A-5, 7, 52-54).

[11] The overwhelming evidence below was that the materials posted by the Petitioner did *not* relate to the curriculum. As the District Court pointed out, Zanca repeatedly testified at his deposition that the postings did *not* relate to the teaching of Spanish by Lee (A-41, n. 18). Lee testified that the materials he posted did *not* relate to the curriculum and that he had put the materials up because he found them interesting, uplifting, or expressive of something he believed was important. He also testified that the removed materials were not related to any Spanish curricular objective (A-7). Nothing in the record supports the view that the materials were posted as a part of Lee's curricular responsibilities. To the contrary, they were his personal expression posted under a policy that allowed teachers to express themselves within the classroom in this manner.

eviscerated the fundamental law of the land. *See Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J. dissenting).[12] It renders new meaning to the term "summary" judgment and makes hollow the representation that "[t]he facts underlying this appeal are presented in the light most favorable to Lee, as he is the non-moving party with respect to the School Board's summary judgment motion." A-3, n. 1. It is also inconsistent with the approach taken in this Court's recent decision in a school speech case, *Morse*, where the issue of whether an Olympic torch rally was "school sponsored" was presented and resolved by reference to the record testimony of, *inter alia*, the school's principal and superintendent. For example, the *Morse* decision made specific reference to the principal's testimony that the rally was "an approved social event or class trip." *Morse*, 551 U.S. at ___, slip op. at 6.

Perhaps the most disturbing aspect of the panel decision below is the extension of *Kuhlmeier*'s concept of curricular literally to all in-school teacher expression, curricular or not, permitting standardless censorship at the mere whim of school officials. Indeed, the Fourth Circuit's decision made this clear when it wrote as follows:

> Classroom speech can impart particular knowledge if its purpose is to convey a specific

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[12] An example of the distortion created by the Fourth Circuit's approach is a critical observation relegating a significant issue in the case to a footnote. The court dismisses as "irrelevant" both Lee's and Zanca's testimony that Lee's postings did ***not*** relate to the curriculum "because the [*Kuhlmeier*] definition encompasses more than a subjective view of curriculum." (A-19, n. 15). Subjectivity is turned on its head, however, when the undisputed first-hand testimony of both parties is, in effect, expunged by a new reality created by application of a judicially-devised legal construct.

> message or information to students. That specific message need not relate to, for example, Spanish instruction, but could instead constitute information on social or moral values that the teacher believes the students should learn or be exposed to.

(A-23, 24). Thus, all that is necessary for teacher expression to be subject to suppression under *Kuhlmeier* is that it "convey a specific message or information to students." This test renders any communicative or expressive activity by a teacher in the classroom, even on matters of personal or public interest, "curricular" speech and without First Amendment protection. If allowed to stand, the decision below gives school officials *carte blanche* power to engage in viewpoint discrimination against teacher expression, even when speech is by practice otherwise permitted. Today it involves items with religious content; tomorrow it may be politics, sports, current events, or inquiry into certain subject matter. For example, schools would be free to allow teachers to post campaign materials favoring a particular candidate during an election cycle, while forbidding similar materials presenting the views of an opposing candidate. It would allow with impunity the promotion of one side of the public debate on abortion or other controversial topics and the censorship of teachers expressing views on opposing sides of that debate. So long as the speech is "curricular," it is fair game for prescription and censorship, notwithstanding any school policies and/or practices or customs to the contrary.

This Court has made clear that viewpoint discrimination is an egregious form of content discrimination that is fundamentally inconsistent with the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); a*ccord, Good News Club v. Milford*

Cent. Sch., 533 U.S. 98, 112 (2001).[13] The Fourth Circuit's ruling legitimizes viewpoint discrimination even when the school permits speech on noncurricular matters. It should, therefore, be reversed.[14]

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[13] A policy excluding religion as a category of speech is not viewpoint neutral if the policy permits the presentation of other views dealing with the same subject but excludes those presenting the issue from a religious standpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). The court below recognized that Zanca removed selected materials posted by the Petitioner because Zanca deemed the removed materials "overly religious." (A-6). It did not explain how the three scouts praying, or the admonition to "Pray for America," were also not equally religious, or how the other materials pertaining to a South American religious festival and an Inca priestly tapestry were not also similarly proscribed.

[14] Petitioner also contends that the removed materials constituted speech about "matters of public concern" and were therefore protected expression under *Pickering* and *Connick*. The panel below admitted as much, agreeing that the argument that these materials were protected speech "might normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern." (A-15). However, it dispatched the argument with the remarkably unqualified and summary statement that "disputes over curriculum constitute ordinary employment disputes and do not implicate speech on a matter of public concern." (A-18). The record, however, is to the contrary. The *Daily Press* news article titled "The God Gap" concerned the religious and philosophical views of the 2004 candidates for President and was displayed *while the 2004 Presidential campaign was in progress*. It is difficult to imagine a subject of more "social, political, or other interest to a community" or that "the community is likely to be truly concerned with or interested in" than a current Presidential election and candidates. As pointed out by this Court in *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), even private remarks concerning the President are on matters of public concern. The same is true of the *USA Today* news article titled "White House Staffers Gather For Bible Study," which concerned the conduct of the President's then-Attorney General. Moreover, the poster depicting George Washington promoting the National Day of Prayer and a *Daily Press* news article regarding a local girl who had been killed when the plane she was flying

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari.

Date: July 31, 2007.

Respectfully submitted,

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in was shot down mistakenly also qualify as matters of public concern for First Amendment protection. The National Day of Prayer is a Congressionally recognized event that by law is the subject of a Presidential proclamation. 36 U.S.C. § 119. The story concerning the local girl shot down while on a religious mission was quite obviously an issue of interest to the community because it drew attention from national media outlets, not to mention extensive coverage in the major newspaper in the Tidewater, Virginia area. Absent any evidence of disruption or interference with the operation of Tabb High School, the censorship of the Petitioner's speech cannot be justified under *Pickering* and *Connick*.

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No. _____

In The Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Opinion of the United States Court of Appeals for the Fourth Circuit filed May 2, 2007, No. 06-1363 ..... A-1

Opinion and Final Order of the United States District Court for the Eastern District of Virginia, filed February 23, 2006, Action No. 4:05cv125 ..... A-27

Picture of Boy Scouts praying from page 262 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-64

Picture of pilot from page 263 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-65

U.S.A Today news article dated October 14, 2002 titled "White House Staffers Gather For Bible Study" from page 265 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-66

Daily Press news article dated November 17, 2005 titled "The God Gap" from page 126 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-67

Peninsula Rescue Mission news article dated June 2001 concerning Roni Bowers from page 264 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-68

Daily Press news article dated November 1, 2001 titled "Panel says CIA shares blame for downing flight in Peru" from page 266 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-69

Poster concerning the National Day of Prayer depicting George Washington from page 261 of the Joint Appendix filed in Case No. 06-1363, United States Court of Appeals for the Fourth Circuit A-70

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM LEE,
Plaintiff-Appellant,

v.

YORK COUNTY SCHOOL DIVISION; STEVEN R. STAPLES, In his official capacity as Superintendent of the York County School Division; YORK COUNTY SCHOOL BOARD; R. PAGE MINTER; BARBARA S. HAYWOOD; LINDA MEADOWS; MARK A. MEDFORD; BARRENT M. HENRY, In their official capacity as members of the Board of Education for York County,
Defendants-Appellees.

No. 06-1363

Appeal from the United States District Court
for the Eastern District of Virginia, at Newport News
Rebecca Beach Smith, District Judge
(4:05-cv-00125-RBS)

Argued: November 30, 2006

Decided May 2, 2007

Before KING and SHEDD, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Shedd and Judge Hamilton concur.

COUNSEL

ARGUED: Gary Alvin Bryant, WILLCOX & SAVAGE, Norfolk, Virginia, for Appellant. William McFarland, MCGUIREWOODS, LLP, Norfolk, Virginia, for Appellees. **ON BRIEF:** Steve C. Taylor, Chesapeake, Virginia, for Appellant. Steven R. Zahn, MCGUIREWOODS, LLP, Norfolk, Virginia; William H. Baxter, II, Erin M. Sine, MCGUIREWOODS, LLP, Richmond, Virginia, for Appellees.

OPINION

KING, Circuit Judge:

Plaintiff William Lee appeals from the district court's award of summary judgment to the York County, Virginia, School Board, five members of the County's Board of Education, and the County's School Superintendent (collectively, the "School Board" or the "Board") on his § 1983 free speech claim. *See Lee v. York County Sch. Div., 418 F. Supp. 2d 816 (E.D. Va. 2006)* (the "Opinion"). Lee, who teaches high school in York County, initiated this suit in the Eastern District of Virginia in August 2005, maintaining

that the School Board had violated his rights under the First Amendment's Free Speech Clause by removing materials he had posted on the bulletin boards in his classroom. In its February 23, 2006 Opinion, the district court rejected Lee's claim, concluding that his postings were curricular in nature and thus did not constitute speech on a matter of public concern. In substance, Lee maintains on appeal that he possesses a First Amendment right to post his materials on the classroom bulletin boards. This contention is contrary to the relevant precedent and, as explained below, we affirm.

I.

A.

In 2001, Lee began teaching Spanish at Tabb High School, a public high school operated by the School Board in Yorktown, Virginia.[1] Prior to his assignment at Tabb High, Lee had been employed by the School Board for about a year, as a teacher at a York County middle school. Sometime in October 2004, an employee of the School Board received a complaint from a private citizen who expressed concern over certain materials posted on the bulletin boards within Lee's classroom.[2] The crux of the citizen's complaint was that some of Lee's postings were overly religious in nature. After receiving the complaint, the School Board asked Crispin

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[1] The facts underlying this appeal are presented in the light most favorable to Lee, as he is the nonmoving party with respect to the School Board's summary judgment motion. *See Seabulk Offshore, Ltd. v. Am. Home Assur. Co., 377 F.3d 408, 418 (4th Cir. 2004)*. The facts are drawn from the summary judgment record made in the district court.

[2] The identity of the complaining private citizen is sealed, pursuant to a protective order entered by the district court on November 22, 2005.

Zanca, the Principal of Tabb High, to investigate the matter. As Principal, it is Zanca's obligation to ensure that teachers adhere to the Board's curriculum guidelines and policies.

On October 19, 2004, after speaking with the School Board about the complaint regarding Lee, Zanca proceeded to Lee's classroom to discuss the matter with him. Lee was absent from school that day, however, and Zanca examined the materials posted on the bulletin boards in his absence. In so doing, Zanca discovered certain items that, in his view, should not have been posted in a compulsory classroom setting. Specifically, he testified that he "could not find any reason why [these items] would be posted in a classroom." J.A. 161.[3]

Zanca removed five items (collectively, the "Removed Items" or the "Items") from Lee's bulletin boards: (1) a 2001 National Day of Prayer poster, featuring George Washington kneeling in prayer; (2) a May 15, 2004, *Daily Press* news article entitled "The God Gap," outlining religious and philosophical differences between President Bush and his challenger John Kerry; (3) an October 14, 2002, *USA Today* news article entitled "White House Staffers Gather for Bible Study," describing how then Attorney General Ashcroft led staffers in voluntary Bible study sessions; (4) a November 1, 2001, *Daily Press* news article, detailing the missionary activities of a former Virginia high school student, Veronica Bowers, who had been killed when her plane was shot down in South America; and (5) a June 2001 Peninsula Rescue Mission newsletter, highlighting the missionary work of

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[3] Citations to "J.A. ___" refer to the Joint Appendix filed by the parties in this appeal.

Bowers.[4] Zanca placed the Removed Items on Lee's desk in the teachers' lounge and left an explanatory note in Lee's school mailbox.

In his deposition for this case, Zanca testified that neither Tabb High School nor the School Board has any written policies on what a teacher may properly post on classroom walls or bulletin boards. Zanca explained, however, that there is an applicable unwritten policy, custom, and practice for York County teachers in that regard, authorizing teachers to place materials on bulletin boards that relate to the curriculum being taught or that are of personal interest to them. For example, some teachers place famous quotes, articles on current events, and pictures of sports figures on the bulletin boards of their classrooms. Zanca explained that, as a general matter, he has always relied on the sound judgment of Tabb High's teachers as to what materials should be posted in their classrooms.

Although there is no written policy on the posting or removal of classroom materials, Zanca explained that his duties as Principal include the monitoring of such postings, as well as the removal of any postings that are inappropriate for the school setting. In determining whether any particular item should be removed, the School Board has accorded its principals broad discretion to evaluate and decide which postings are appropriate for a particular classroom setting. Zanca testified that the teachers at Tabb High have always understood that any postings contradicting the unwritten

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[4] Attached to the Peninsula Rescue Mission newsletter was an envelope requesting donations for the organization's missionary work.

policy are subject to removal. Under the unwritten policy, inappropriate postings include items that violate the First Amendment, that are offensive, that use profanity, or that are otherwise unrelated to curricular objectives. In evaluating whether a particular posting is subject to removal, Zanca primarily assesses whether it is relevant to the curriculum being taught by the particular teacher.[5] He testified that, although certain materials may be inappropriate if posted generally, they could well be appropriate when used in connection with a specific curricular objective. For example, some current events postings may only be appropriate when used in a classroom where history or government courses are taught.

When Zanca first viewed the Removed Items, he saw that certain of the postings prominently included religious terms such as "Bible" or "God." Although Zanca did not read any of the articles in their entirety, he exercised his discretion as Principal on the five Removed Items because he saw them as overly religious and thus violative of the Establishment Clause of the First Amendment.[6] Aside from

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[5] Prior to the incident underlying this appeal, Zanca had never removed posted materials from any classroom. He has had, however, teachers ask whether a questionable item would be appropriate to post in the classroom prior to so doing. Zanca has also removed inappropriate items posted on bulletin boards in Tabb High's hallways.

[6] When the Removed Items were taken from Lee's classroom, Zanca decided not to remove a posted picture of Boy Scouts praying in memory of the September 11, 2001, terrorist attacks or a picture of a United States military pilot whose helmet said "Pray for America." He left the Boy Scouts picture on the bulletin board because many of the students and their parents had been personally affected by the September 11th terrorist attacks, and he felt that the picture embodied a sensitive issue for Tabb

his determination that the postings might be legally problematic, Zanca believed the Removed Items to be irrelevant to the Spanish curricular objectives that Lee was obliged to follow within his classroom.

When Lee returned to Tabb High three days later, he found the Removed Items on his desk and Zanca's note in his mailbox. Lee promptly discussed the matter with Zanca, who explained that he had received a citizen's complaint about postings in Lee's classroom. Zanca informed Lee that the Removed Items were taken down because they were inappropriate in a Spanish classroom. Lee thereafter retained a lawyer, who wrote to the Board Superintendent requesting permission for Lee to repost the Removed Items. Following an investigation by the Board's counsel, Lee's request to repost was denied.

During his deposition, Lee agreed that the School Board has no written policies concerning what can be appropriately posted on classroom bulletin boards. He acknowledged the existence of an unwritten Board policy, practice, and custom, however, that allows teachers to post materials related to curricular objectives, or to post materials of a general and personal nature that are consistent with the educational mission of Tabb High. Lee denied placing the Removed Items on the bulletin boards to endorse his own faith, did not believe that the Items were related to any particular Spanish curricular objective, and had not referred to any of them while teaching. When asked why he had posted the Removed Items, Lee explained that he had posted each of

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High. Zanca left the pilot's picture out of respect for Lee's prior military experience.

them either because he liked it or because it was uplifting. He also explained that a teacher could post most anything in a classroom and make it relevant to the curriculum being taught. He said that schoolteachers often use creative materials to catch and retain the attention of students.

Lee also acknowledged that he had posted the Removed Items because they were, in his opinion, "positive and good for the kids." J.A. 53. Because of his position as a teacher, Lee felt responsible for more than just the academic well-being of his students. He stated, "I'm accountable in that classroom for [the students'] welfare and their attitudes and their feelings, which are sensitive and fluctuate daily, and I find the hope embodied in some images to be beneficial." *Id.* For example, with respect to the poster of George Washington, Lee testified that it contained "a positive figure and good for every classroom in the school." *Id.* at 103. With respect to the article on Attorney General Ashcroft, Lee explained it might be helpful to a student seeking hope and inspiration. *See id.* at 61. Finally, with respect to the Peninsular Rescue Mission newsletter, Lee said that it was posted to encourage students not to be ashamed of their faith and because it dealt with an eastern Virginia high school student who had studied Spanish. *See id.* at 68-69.

B.

On August 11, 2005, Lee filed his Complaint in this case, along with a motion for a preliminary injunction, alleging that the School Board had controverted § 1983 and deprived him of his First Amendment right to free speech.[7] On

[7] The First Amendment contains, inter alia, a Free Speech Clause and an Establishment Clause. The Free Speech Clause provides that "Congress

September 13, 2005, the district court denied Lee's request for a preliminary injunction and ordered an expedited discovery schedule. After discovery, both Lee and the School Board filed motions for summary judgment, agreeing that there were no disputes of material fact.

On February 23, 2006, the court filed its Opinion and Final Order in this matter, granting the Board's motion for summary judgment and denying Lee's motion for summary judgment. *See* Opinion 1.[8] Relying on our decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (en banc), the court applied the Supreme Court's *Pickering-Connick* analysis and assessed whether Lee's postings constituted speech protected by the First Amendment. *See id.* at 7-9.[9] Upon so doing, the court

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shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." *Id.* Although both clauses are mentioned in this dispute, Lee's § 1983 claim arises under the Free Speech Clause only. The legal principles governing an Establishment Clause claim are thus not at issue in this appeal.

Section 1983 of Title 42 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

[8] The district court's Opinion of February 23, 2006, is found in the Joint Appendix at J.A. 282-315.

[9] The *Pickering-Connick* analysis is derived from the Supreme Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). As further explained herein, this analytical framework is used to determine whether a public employee's speech is protected under the First Amendment. *See Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc).

concluded that the Removed Items were, as a matter of law, curricular in nature. *See id.* at 14-16. The court first focused on the broad definition of "curriculum" applied by our en banc Court in *Boring*, noting that "curricular speech encompasses a wide range of types of communication." *Id.* at 13. The court concluded that this definition of curriculum includes teaching methodology, as it "is nothing more than an execution of a teacher's employment duties." *Id.* (citing *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000) (en banc) ("It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way.")).

Applying the *Boring* principles to Lee's free speech claim, the district court concluded that the "postings on Lee's classroom walls qualify as the type of materials that can constitute curricular speech." Opinion 14. Specifically, the court determined that the Removed Items constituted curricular speech for two reasons: (1) Lee used the Items as part of his teaching methodology, and (2) Lee sought to instruct and impart knowledge to his students through use of the Items. *See id.* Because the court determined that the Removed Items were curricular in nature, it also ruled, on the basis of *Boring*, that they were per se not a matter of public concern. *See id.* at 12. Thus, because Lee's speech was not a matter of public concern, he possessed no First Amendment protection in posting the Removed Items in his classroom. *See id.* at 22.

On March 21, 2006, Lee filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

As a general proposition, we review de novo a district court's award of summary judgment, viewing the facts in the light most favorable to the nonmoving party. *See Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). An award of summary judgment may appropriately be made only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Finally, in applying the *Pickering-Connick* legal principles to the issues in this appeal, we review de novo the district court's ruling that Lee's postings of the Removed Items did not constitute speech on a matter of public concern. *See Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc).

III.

A.

On appeal, Lee essentially contends that he possesses a First Amendment free speech right to post certain materials on the School Board's classroom bulletin boards. In addressing this contention, it is important to first acknowledge that schoolteachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch.*

Dist., 393 U.S. 503, 506 (1969). Nevertheless, certain limitations are placed on the free speech rights of schoolteachers, such as Lee, due to the nature of their employment by government-operated schools. More specifically, it seems settled that "the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

In assessing whether a public employee's speech is protected by the First Amendment, and thus not subject to regulation by a state-entity employer, a court is obliged to balance "'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick v. Myers*, 461 U.S. 138, 142 (1983) (alteration in original) (quoting *Pickering*, 391 U.S. at 568).[10] In

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[10] In his appellate brief, Lee urges us to reject the *Pickering-Connick* standard, and instead apply what is known as the *Tinker* analysis to his First Amendment free speech claim. The *Tinker* analysis was articulated by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and typically applies to disputes involving the speech of students, not teachers. Under *Tinker*, the School Board would not be able to regulate Lee's speech if it was unrelated to the curriculum and did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393

performing this balancing test, a reviewing court must make two inquiries. It examines, first of all, "whether the speech at issue was that of a private citizen speaking on a matter of public concern." *Urofsky*, 216 F.3d at 406. If the employee was speaking as a citizen on a matter of public concern, the court must "consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace." *Id.*

As explained below, under the *Pickering-Connick* balancing standard Lee's classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature. Thus, Lee cannot use the First Amendment to justify his assertion that he is free to place his postings on the classroom bulletin boards without oversight by the School Board. In order to constitute protected speech under the First Amendment, the speech at issue must satisfy both prongs of the *Pickering-Connick* framework. *See Urofsky*, 216 F.3d at 406. Because Lee's speech fails to satisfy the first of those inquiries, we need not reach the second inquiry and decide whether the interests of the School Board (as employer) outweigh those of Lee (as teacher-employee).

B.

In applying the *Pickering-Connick* framework to this matter, we first inquire whether Lee, in posting the Removed

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U.S. at 509 (internal quotation marks omitted). Because, as explained *infra*, Lee's speech in this dispute was curricular in nature, we are obliged to apply the *Pickering-Connick* standard as articulated in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (en banc).

Items in his classroom at Tabb High, was speaking as a private citizen on a matter of public concern. Lee maintains on appeal that he can post any materials he wishes on the classroom bulletin boards provided that, in so doing, he speaks not as a teacher, but instead as a private citizen only. He thus maintains that the fact he posted the Removed Items in his classroom is irrelevant to the issue of whether he was acting as a private citizen or as a schoolteacher. *See Urofsky*, 216 F.3d at 407 ("An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace."); *but see Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) (concluding that when public employee speaks pursuant to his official duties, his speech is not entitled to First Amendment protection under the *Pickering-Connick* standard).[11] Lee further contends that each of the Removed Items constitutes speech concerning a public matter, because each item involves either a political issue or a matter of interest to the community. *Id.* at 406-07 ("Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community."). He emphasizes that, notwithstanding their religious overtones, the Removed Items involve political information and issues (e.g., the article "The God Gap," explaining information on presidential candidates; the article "White House Staffers Gather for Bible Study," outlining activities of an Attorney General; and the National Day of Prayer poster, advertising a Presidential Proclamation) and

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[11] The Supreme Court in *Garcetti* held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 126 S. Ct. at 1960. The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. *Id.* at 1962. Thus, we continue to apply the *Pickering-Connick* standard as articulated in *Boring* to this appeal.

matters of general community interest (e.g., the articles concerning a local woman killed in a plane crash).

Contentions such as these might normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern. In this case, however, Lee's contentions fail to take account of important considerations of precedent. Courts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) ("We thus recognize that the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts." (internal quotation marks and citation omitted)); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 n.1 (3d Cir. 1998) (recognizing that "a public school teacher's in class conduct is not protected by the First Amendment" (internal quotation marks omitted)); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("[W]here the in-class speech of a teacher is concerned, the school has an interest not only in preventing interference with the day-to-day operation of its classrooms . . ., but also in scrutinizing expressions that the public might reasonably perceive to bear its imprimatur." (internal quotation marks omitted)); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (concluding that teacher does not possess First Amendment right to choose his own classroom management techniques).

Of additional importance, the enhanced right of a school board to regulate the speech of its teachers in classroom settings is supported by the Supreme Court's explicit recognition that First Amendment free speech rights in a school environment are not "automatically coextensive with the rights of adults in other settings." *Hazelwood*, 484 U.S. at 266 (internal quotation marks omitted). As the *Hazelwood* Court explained, the exercise of such rights "must be applied in light of the special characteristics of the school environment." *Id.* (internal quotation marks omitted). Put simply, our school systems are responsible for adequately and properly educating our youth. A school board carrying out this vital responsibility is entitled to some enhanced control over expressions within its classrooms, so that it can "assure . . . that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271; *see also Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[I]t is well-settled that public schools may limit classroom speech to promote educational goals."). Thus, "[a] school need not tolerate student [or teacher] speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school." *Id.* at 266 (internal quotation marks and citation omitted).

In order to take account of the characteristics of a dispute involving in-class speech by a teacher-employee, we have concluded that special considerations should be assessed by a reviewing court on whether the contested speech constitutes a matter of public concern.[12] In *Boring v.*

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[12] The parties do not contest the proposition that Lee's postings qualify as in-class speech.

Buncombe County Board of Education, for example, we concluded that a teacher's selection of a school play constituted speech that did not implicate a matter of public concern, and thus was not protected by the First Amendment. 136 F.3d 364, 369 (4th Cir. 1998) (en banc). The teacher in that case, Margaret Boring, had been transferred for, inter alia, her selection of a controversial school play, *Independence*, that was performed by four high school students at a state competition. *Id.* at 366-67. Boring alleged that her transfer was in retaliation for the selection of the play and therefore violated her First Amendment right of free speech. *Id.* at 367.

In concluding that Boring's speech was not protected by the First Amendment, we analyzed whether the speech at issue — her selection of the school play — was curricular in nature, using the term "curriculum" as it had been defined and applied by the Supreme Court in *Hazelwood*. *Id.* at 368.[13] There, the Supreme Court defined "curriculum" as

> school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not

[13] In *Boring*, we examined the definition of "curriculum" in *Webster's Third New International Dictionary* and readily determined that there is no material difference between the dictionary definition of the term and the definition used and applied by the Court in *Hazelwood*. *See* 136 F.3d at 367-68. For the purposes of this appeal, we rely primarily on the definition applied in *Hazelwood*.

> they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

484 U.S. at 271. The en banc *Boring* majority decision, authored by our colleague Judge Widener, determined the selection of the school play to be curricular "from the fact that it was supervised by a faculty member, Mrs. Boring; it was performed in interscholastic drama competitions; and the theater program at the high school was obviously intended to impart particular skills, such as acting, to student participants." *Id.* at 368. Judge Widener's opinion concluded that "[t]hese factors demonstrate beyond doubt that 'students, parents, and members of the public might reasonably perceive [the production of the play *Independence*] to bear the imprimatur of the school.'" *Id.* (alteration in original) (quoting *Hazelwood*, 484 U.S. at 271).

The *Boring* Court reasoned that, if contested speech is curricular in nature, it does not constitute speech on a matter of public concern. *See id.* at 368-69. In so concluding, Judge Widener reasoned that disputes over curriculum constitute ordinary employment disputes and do not implicate speech on matters of public concern. *See id.* at 369.[14] Thus, when a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of

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[14] The *Boring* Court also addressed Boring's additional contention that "the district court erred in holding that the defendants had a legitimate pedagogical interest in punishing [Boring] for her speech." 136 F.3d at 369. Lee does not contend on appeal that the School Board lacked a legitimate pedagogical interest in removing his postings from the classroom bulletin boards.

whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular. This determination — whether the contested speech is curricular in nature — is a question of law for the court.[15]

C.

In evaluating whether a schoolteacher's in-class speech is curricular in nature, and thus not a matter of public concern, we are obliged to apply the *Hazelwood* definition of "curriculum." *Boring*, 136 F.3d at 368. To be curricular under this definition, the contested speech must satisfy both of the definition's categories of requirements. The *Hazelwood* definition first explains that, in order for a school board to regulate speech, such speech must constitute school-sponsored expression bearing the imprimatur of the school. 484 U.S. at 271. *Hazelwood* then narrows this broad category by also requiring that, in order to be considered curricular in nature, the speech must also be supervised by faculty

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[15] Although *Boring* did not directly hold that the determination of whether speech is curricular is a question of law, the majority applied the *Hazelwood* definition as if it were an issue of law rather than of fact. *See* 136 F.3d at 367-68 (upholding district court's conclusion that speech was curricular). Furthermore, under our analytical framework, the determination of whether contested speech is a matter of public concern is dependent on whether the speech is curricular in situations involving in-class teacher speech. It is thus reasonable for the curricular determination, like the general determination on whether speech is a matter of public concern, to be a question of law. As such, it is irrelevant that Lee and Zanca may have subjectively believed that the Removed Items were not part of the curriculum of teaching Spanish at Tabb High, because the *Hazelwood* definition encompasses more than a subjective view of curriculum.

members and designed to impart particular knowledge to the students. *Id.* Lee contends on appeal that his classroom postings of the Removed Items do not fit within the *Hazelwood* definition of "curriculum," in that they were neither directly nor indirectly related to the Spanish curricular objectives he is obliged to teach. Furthermore, Lee testified that the Removed Items were not posted for Spanish instructional purposes. According to Lee, because the Removed Items are not related to his instruction of Spanish, they are not curricular speech. Using this narrow definition of curriculum, Lee asserts that he has a First Amendment right to post any such materials on the classroom bulletin boards.

In these circumstances, however, applying the pertinent legal principles, Lee's speech nevertheless was curricular in nature, because his postings of the Removed Items constituted school-sponsored speech bearing the imprimatur of Tabb High School, and they were designed to impart particular knowledge to the students. We assess each of the two categorical requirements of the *Hazelwood* definition — whether the speech is school-sponsored bearing the imprimatur of the school, and whether the speech is supervised by faculty members and designed to impart knowledge to the students — in turn.

1.

First, on whether Lee's postings constitute school-sponsored speech bearing the imprimatur of the school, the *Hazelwood* definition of curriculum encompasses more than simply the objectives of a specific course of study taught by a

particular teacher. Indeed, our sister circuits have interpreted school-sponsored speech bearing the imprimatur of a school to include a variety of expressive activities that occur on school property. *See, e.g.*, *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 931 (10th Cir. 2002) (concluding that memorial tiles project — permitting residents to design tiles for school walls — was school-sponsored speech bearing imprimatur of school, because it was supervised by school officials and tiles would be placed on school walls); *Ward*, 996 F.2d at 453 (concluding that teacher's in-class statement was school-sponsored speech); *Bishop*, 926 F.2d at 1074 (concluding that professor's classroom statements were school-sponsored expressive activities); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777-78 (10th Cir. 1991) (concluding that teacher's discussion of school rumor during class was school-sponsored speech). In order to determine whether challenged teacher speech is school-sponsored and bears the imprimatur of the school, a reviewing court must examine whether it has been "so closely connected to the school that it appears that the school is somehow sponsoring the speech." *Fleming*, 298 F.3d at 925. A reviewing court should also appraise the level of involvement the school had in organizing or supervising the contested speech. *Id.*[16]

In applying this standard, Lee's postings plainly constitute school-sponsored speech bearing the imprimatur of the school. First, although Lee did not refer to the

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[16] As discussed by the Tenth Circuit in its *Fleming* decision, certain expressive activities may be closely tied to a school, yet not school-sponsored speech bearing the school's imprimatur. *See* 298 F.3d at 925. Such activities might include those sponsored by outside organizations who happen to use school facilities after school hours. *See id.*

Removed Items during instructional time, they were constantly present for review by students in a compulsory classroom setting. As a general proposition, students and parents are likely to regard a teacher's in-class speech as approved and supported by the school, as compared to a teacher's out-of-class statements. *See Ward*, 996 F.2d at 453 ("[A] teacher's statements in class during an instructional period are also part of the curriculum and a regular class activity."); *Bishop*, 926 F.2d at 1074 ("Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university."). Furthermore, the Removed Items were not posted on a private bulletin board owned by Lee, but on the school-owned bulletin boards in his classroom. And, according to the parties, these bulletin boards were subject to recognized restrictions on the materials that could be properly posted there. In these circumstances, it would be reasonable for students and parents alike to perceive that materials posted on the classroom bulletin boards were closely connected with Tabb High or had been approved by its administrators. Thus, the materials posted on those bulletin boards were likely to be attributed to Tabb High.

Second, the School Board, through Principal Zanca, maintained oversight of the bulletin boards and their postings, including the Removed Items. Although the teachers at Tabb High possess substantial discretion in the selection of items to be posted in their classrooms, their exercise of that discretion was subject to the supervision of the School's Principal. Principal Zanca was responsible for monitoring the classroom bulletin boards, and he had authority to remove inappropriate items. Thus, because the

Removed Items were posted on school-owned and -controlled bulletin boards in a compulsory classroom setting, Lee's actions in posting these Items would reasonably be imputed to Tabb High.

2.

Although a broad category of speech made in a school setting is properly considered school-sponsored, the *Hazelwood* definition also limits curricular speech by requiring that it be supervised by faculty members and designed to impart particular knowledge to the students. Lee's postings readily satisfy these two requirements, as well. First, as discussed above, the classroom bulletin boards and their contents were supervised by the teachers, who were the only persons in the school authorized to post items on the bulletin boards, and by Principal Zanca, who oversaw and monitored all such postings.

Second, although Lee contends that the definition of "curriculum" should be limited to speech related to traditional classroom instruction, classroom speech can readily be designed to impart particular knowledge, and yet not otherwise relate to the curricular objectives that a teacher must follow. Whether classroom speech is designed to impart particular knowledge has a broader meaning than the name of a traditional course of study, or the designation of materials used to achieve specific curricular objectives. *See Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214-15 (11th Cir. 2004) (per curiam) (concluding that after-school beautification project, which permitted students to paint murals on school's walls, was designed to impart particular knowledge to students because "it allowed student participants to express themselves artistically, allowed

student audiences to appreciate their fellow students' artwork, and promoted school spirit"). Classroom speech can impart particular knowledge if its purpose is to convey a specific message or information to students. That specific message need not relate to, for example, Spanish instruction, but could instead constitute information on social or moral values that the teacher believes the students should learn or be exposed to.

In the circumstances presented here, the Removed Items were plainly "designed to impart particular knowledge" to the students in Lee's classroom. Lee testified that, along with his obligation to teach Spanish, he was responsible for the emotional and moral well-being of his students. In order to satisfy this responsibility, Lee posted the Removed Items on the classroom bulletin boards to inform his students of certain positive figures and these figures' social and moral values. For example, Lee posted the poster of George Washington because he wanted to show the students that George Washington was a positive figure in American history. He posted the newspaper articles on President Bush and Attorney General Ashcroft because he wanted to show the students examples of political figures he believes have good social and religious values. Finally, Lee posted the articles on the local missionary to show the students an example of a local person who used her ability to speak Spanish to help others and who was not ashamed of her faith. Through these postings, Lee sought to impart the particular knowledge of these figures and their values to his students in order to expose the students to social and moral values he deemed beneficial to their emotional growth.

Although schoolteachers provide more than academic knowledge to their students, it is not a court's obligation to

determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determinations. Our conclusion on this point is entirely consistent with the "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273. As observed by Judge Widener in *Boring*, "it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges." 136 F.3d at 371.

Because the Removed Items constitute school-sponsored speech bearing the imprimatur of the school, and they were designed to impart particular knowledge to the students at Tabb High, the Items are curricular in nature. As such, the dispute over Lee's postings of the Removed Items is nothing more than an ordinary employment dispute. *See Boring*, 136 F.3d at 369 (concluding that disagreements over curricular speech constitute ordinary employment disputes). The Items do not constitute speech on a matter of public concern and are not protected by the First Amendment. *See id.*[17]

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[17] In his appellate brief, Lee contends, in the alternative, that the School Board violated his First Amendment free speech rights because it censored his postings on the basis of their viewpoint in an [sic] nonpublic forum, and because the Board did not provide him with any written guidelines on what could be posted. Because Lee's speech was curricular and thus not on a matter of public concern, it is not accorded any First Amendment free speech protection. *See Urofsky*, 216 F.3d at 406 ("If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state,

IV.

Pursuant to the foregoing, we affirm the district court's award of summary judgment to the School Board.

AFFIRMED

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as employer, may regulate it without infringing any First Amendment protection.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

FILED

FEB 23 2006

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

WILLIAM LEE,

Plaintiff,

v. **ACTION NO. 4:05cv125**

YORK COUNTY SCHOOL DIVISION, et al.,

Defendants.

OPINION AND FINAL ORDER

This matter comes before the court on the parties' cross-motions for summary judgment. For the reasons set forth herein, the court **GRANTS** the defendants' motion and **DENIES** the plaintiff's motion.

I. Factual and Procedural History

Since August, 2002, plaintiff William Lee has been a Spanish teacher at Tabb High School ("Tabb"), Pl.'s Aff. at ¶ 2, a public school operated by defendant York County

School Board (the "School Board" or the "Board"),[1] Pl.'s Compl. at 4, ¶ 9. Lee also is the faculty sponsor of First Priority, an approved student club at Tabb. Id. at ¶ 14.[2] Lee alleges that Tabb High School has "a policy, custom and practice of allowing instructors to post upon the walls and bulletin boards of their assigned classrooms pictures and printed and illustrated materials that are consistent with the educational mission of the school," id. at ¶ 12; that are "of a general and personal nature that are not otherwise inconsistent with the educational mission of the school," id. at ¶ 13; or "that are consistent with the mission and/or vision of the approved club of which [the teacher is] the faculty sponsor," id. at 5, ¶ 15.

At the start of the 2004-2005 school year, Lee placed pictures and printed and illustrated materials on his classroom walls. Id. at 5, ¶ 19. Some of these items were of a

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[1] Lee actually states that Tabb is operated by York County School Division (the "School Division"). However, the defendants argue that the School Division is merely a geographical area - much like a county - and is not an actual entity with any authority. Defs.' Mem. in Supp. of Mot. to Dismiss at 11. The defendants thus contend that Lee's submissions confusingly refer to actions taken by the School Division, when such actions were in fact taken by the School Board. Defs.' Reply Mem. in Supp. of Mot. to Dismiss at 11. The defendants further contest whether the School Division is a proper party. Defs.' Mem. in Supp. of Mot. to Dismiss at 11.

The court disposes of this case on the ground that Lee expressed no speech that is protected by the First Amendment, and thus need not determine if the School Division is an entity and a proper party. However, both parties agree that the School Board is a proper defendant. Hence, when Lee refers to an action taken by either the School Division or the School Board, the court, for sake of clarity, will refer to the entity as the "School Board."

[2] Lee describes First Priority as "a praise and worship group of young Christian kids." Lee Depo. at 13.

religious nature. Id. at 6, ¶ 20. In October, 2004, Lee became ill and took sick leave from his teaching duties. Id. at 7, ¶ 25. During Lee's absence, Crispin Zanca, principal at Tabb, was informed that an individual complained about the religiously-oriented materials. Pl.'s Memo. in Supp. of Mot. for S.J. at 2-3, ¶¶ 7-11. Zanca went to Lee's classroom, reviewed the materials, and removed those he believed to be violations of the Establishment Clause. Id. at 3, ¶ 12. Lee retained counsel by January, 2005, at the latest. See Pl.'s Aff. at 4-5, ¶ 19. On August 11, 2005, Lee filed a Complaint in this court, alleging that the defendants violated his free speech and equal protection rights under the First and Fourteenth Amendments of the United States Constitution. Lee also alleged the violation of related rights under the Virginia Constitution. Lee named as defendants York County School Division, York County School Board, Steven R. Staples, R. Page Minter, Barbara S. Haywood, Linda Meadows, Mark A. Medford, and Barrent M. Henry ("Defendants").[3] On the same day, Lee filed a Brief in Support of Plaintiff's Motion for a Preliminary Injunction. However, it was not until August 22, 2005, that Lee properly filed an actual Motion for Preliminary Injunction. Defendants responded on September 2, 2005, and Lee replied on September 8, 2005. On September 13, 2005, the court issued an Order denying Lee's motion, but ordering an expedited schedule for trial.

On October 11, 2005, Defendants submitted a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). On October 24, 2005, Lee submitted a Memorandum in Opposition to Defendants' Motion to

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[3] Lee initially named Staples, Minter, Haywood, Meadows, Medford, and Henry in their individual and official capacities. However, on January 4, 2006, the court granted a voluntary dismissal of these parties as defendants in their individual capacities.

Dismiss. Defendants replied on November 1, 2005. On December 14, 2005, Lee and Defendants cross-submitted motions for summary judgment, pursuant to Federal Rule of Civil Procedure 56(a). On December 21, 2005, the parties cross-submitted responses. The parties informed the court by way of letter dated December 6, 2005, that they would forego filing replies. Since the court has considered evidence attached to the summary judgment motions, it will merge the 12(b)(6) motion into the summary judgment motions.[4] See Fed. R. Civ. P. 12(b) (stating that a 12(b)(6) "motion shall be treated as one for summary judgment" if a court considers "matters outside the pleading"). Moreover, counsel for both the plaintiff and the defendants have agreed that there are no material facts in dispute and that the case should be decided, as a matter of law, on the cross-motions for summary judgment submitted by the parties. See Letter from Steven R. Zahn, Counsel for Defendants, to Elizabeth H. Paret, Clerk of the United States District Court for the Eastern District of Virginia (Dec. 21, 2005) (on file with the Clerk of the court). Consequently, this matter is now ripe for review.

II. First Amendment Rights in the Materials Posted on the Classroom Walls

1. Standard for Defining Lee's First Amendment Rights

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[4] In addition to arguing that Defendants did not violate Lee's First Amendment rights, Defendants' motion to dismiss contended that the Defendants possessed qualified immunity, the School Division was not a proper party, and the School Board was protected by sovereign immunity under the Eleventh Amendment of the Federal Constitution. Defs. Mem. in Supp. of Mot. to Dismiss at 8-13. Because the court grants Defendants' motions on First Amendment grounds, it need not consider these other issues.

The federal courts of appeals have developed at least two competing tests for determining to what extent, if at all, the First Amendment protects speech communicated by a teacher in a public school setting. Chiras v. Miller, 432 F.3d 606, 617 n.29 (5th Cir. 2005) (detailing the circuit split); Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (same);[5] Karen C. Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & EDUC. 1, 1-30 (2001) (discussing and analyzing the circuit split); W. Stuart Stuller, High School Academic Freedom: The Evolution of a Fish out of Water, 77 NEB. L. REV. 301, 304 and 328-29 (1998) (same). Some courts of appeals examine teacher speech by applying Supreme Court cases concerning student speech (the "Tinker-Hazelwood" standard[6]). See, e.g., Ward v. Hickey, 996 F.2d 448, 452-53 (1st Cir. 1993). Other courts of appeals analyze teacher speech by utilizing Supreme Court cases regarding the First Amendment rights of government employees (the "Pickering-Connick" standard[7]). See, e.g., Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 797-800 (5th Cir. 1989).

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[5] The Ninth Circuit actually contends that there is a third standard used by the Third Circuit, in which a teacher's speech is the government's speech and thus is warranted no First Amendment protection. Cal. Teacher's Ass'n v. Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (discussing the Third Circuit's approach). The Third Circuit bases its approach on Rust v. Sullivan, 500 U.S. 173 (1991) and Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995). See Cal. Teacher's Ass'n, 271 F.3d at 1149 n.6.

[6] See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[7] See Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983).

The Fourth Circuit has adopted the Pickering-Connick approach. See Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 371 n.2 (4th Cir. 1998) (en banc) (explaining that Tinker-Hazelwood involved student speech, but a case regarding teacher speech is a matter about employee speech to be decided under Pickering-Connick); see also id. at 372-74 (Luttig, J., concurring) (explaining why Tinker-Hazelwood is inappropriate when analyzing teacher speech and that Pickering-Connick is the correct standard); Chiras, 432 F.3d at 617 n.29 (listing the Fourth Circuit as among the courts of appeals applying Pickering-Connick and rejecting Tinker-Hazelwood); Cal. Teacher's Ass'n, 271 F.3d at 1149 n.6 (same); Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & EDUC. 1 at 16 (same); Stuller, High School Academic Freedom: The Evolution of a Fish out of Water, 77 NEB. L. REV. at 328 (stating that the Fourth Circuit held "that Hazelwood did not supply the controlling test, but that the Pickering/Connick line of cases should be applied"). This case is not about what free speech rights Lee has as an individual expressing himself on private property. Rather, this case is a question about what free speech rights Lee has as a public school teacher-employee. Therefore, the Pickering-Connick standard applies. [8]

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[8] The parties assume that Tinker-Hazelwood is the proper test for analyzing the instant matter, although they do not cite any Fourth Circuit case that examined teacher speech under this standard. The parties did not address how Pickering-Connick applies to this case, or argue why Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998), would be distinguishable from the facts here. But see infra note 13. Consequently, the parties' legal analyses are inapposite on this matter before the court. However, the facts developed during discovery make it clear that there is no genuine dispute of material fact on summary judgment, and the parties so argue and submitted the case to the court on cross-motions for summary judgment. See supra at 4.

a. The Pickering-Connick Standard

An inquiry into whether a government employee's speech is protected by the First Amendment turns on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Thus, a court performs a two-step analysis. First, a court determines if "the speech at issue was that of a private citizen speaking on a matter of public concern." Urofsky v. Gilmore, 216 F.3d 401, 407 (4th Cir. 2000). This question turns on "whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'" Id. at 407 (quoting Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986).[9] If the speech does not involve a matter of public

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[9] Comparing the facts of Pickering and Connick demonstrates the difference between an individual speaking in his role as a citizen as opposed to one speaking in his role as an employee. In Pickering, a local school board submitted a proposal to increase taxes to be used for educational purposes. Pickering, 391 U.S. at 566. The superintendent of schools actively campaigned for the proposal. Id. In response, a teacher wrote a letter to the local newspaper criticizing the school board for its poor financial management and mishandling of bond issues. Id. The school board subsequently fired the teacher. Id. The Court found that the letter constituted an individual expressing himself in his capacity as a private citizen, addressing a matter of public concern, rather than as a public employee. Id. at 574-75. The teacher had made a "public communication," id. at 574; he addressed an issue that the community was currently debating, id. at 566; and "the fact of [his] employment [was] only tangentially and insubstantially" related to the content of the letter, id. at 574. In Connick, an Assistant District Attorney (ADA) in New Orleans objected to her supervisor's decision to transfer her. Connick, 461 U.S. at 140-41. She typed up a questionnaire regarding "office transfer policy, office morale, the need for a grievance

concern, but instead addresses a "personal interest," then the speech is not protected by the First Amendment. Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992). In such a case, the court need not continue to the second step of the analysis and "scrutinize the reasons for" the regulation. Connick, 461 U.S. at 146; see also Urofsky, 216 F.3d at 406 (stating that if the speech "does not touch upon a matter of public concern, the state, as employer, may regulate [the speech] without infringing any First Amendment protection").[10] If, however, the speech does

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committee," and other internal office matters. Id. at 141. She distributed the questionnaire not to the public, but only to her fellow ADAs, after which she was fired. Id. The Court found that the questionnaire — with the exception of one question regarding political corruption — was expressed in the ADA's role as an employee. Id. at 148-49. In contrast to Pickering, the content of the questionnaire was substantially related to "the fact of employment," see Pickering, 391 U.S. at 574, and "reflected one employee's dissatisfaction with a transfer," Connick, 461 U.S. at 148.

[10] The Supreme Court has explained the rationale underlying this principle of First Amendment law. If the speech concerns employment duties or a matter of personal interest, then the government-employer, as an employer, must "enjoy wide latitude in managing [its] offices," Connick, 461 U.S. at 146, in order to preserve "the efficient function of [its] operations," Rankin v. McPherson, 483 U.S. 378, 384 (1987). Therefore, "the government as employer indeed has far broader powers than does the government as sovereign," Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality), and it "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995). "Speech that is of entirely private concern" might be "nondisruptive" and "of value to the speakers and the listeners," Waters, 511 U.S. at 674 (plurality), and the regulation of this speech "may not be fair," Connick, 461 U.S. at 146. However, the Court has "declined to question government employers' decisions on such matters," Waters, 511 U.S. at 674 (plurality), and the restriction on such speech is "not subject to judicial review even if the reasons for the

touch on a matter of public concern, then the court turns to the second step of the analysis and conducts a balancing test. This balancing determines if the employee's interest in expressing himself "outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace." Urofsky, 216 F.3d at 406. If the employee's speech fails either part of the Pickering-Connick test, then the First Amendment accords it no protection.[11] See Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality);[12] see also Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1080 (4th Cir. 1987) (explaining that even if speech addresses a matter of public concern, it is unprotected if it fails the second step in the analysis).

[regulation] are alleged to be mistaken or unreasonable," Connick, 461 U.S. at 146.

[11] Speech which fails the Pickering-Connick test is not "totally beyond the protection of the First Amendment." Connick, 461 U.S. at 147. For example, an employee who speaks on a matter of personal interest can still invoke the First Amendment in defense against a libel suit brought against him by his employer. Id. However, "absent the most unusual circumstances," the employee can bring no action in federal court seeking First Amendment protection for his speech. Id. "[A] federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Id.

[12] Although Waters was a plurality opinion, the concurrences disagreed only on matters regarding a government-employer's investigation into the content of an employee's speech. See Waters, 511 U.S. at 685-86 (Souter, J., concurring) (discussing the differences between the plurality and the concurrences). A majority agreed on the standard rules and application of Pickering-Connick. See generally Waters, 511 U.S. 661.

b. Boring: Applying Pickering-Connick to "Curricular Speech"

In Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1996) (en banc), the Fourth Circuit created a simplified analysis for applying Pickering-Connick in the context of a public teacher's speech, by holding that "curricular speech" does not touch on a matter of public concern and is not protected by the First Amendment.[13] In Boring, a drama teacher produced a student play that was performed in a statewide competition. Id. at 366. The play, titled Independence, dealt with issues such as dysfunctional families, divorce, single parents, lesbianism, and illegitimate children. Id. The teacher was subsequently transferred. Id. at 366-67. She filed a complaint alleging "that her transfer was in retaliation for expression of unpopular views through the production of the play." Id. at 367. The court dismissed the complaint and the Fourth Circuit affirmed the dismissal, finding that the play was part of the school's curriculum. Id. at 368. It is "the school, not the teacher, [that] has the right to

[13] In a number of its briefs, Defendants cited Boring for the proposition that teachers have no First Amendment rights in a school's curriculum. See, e.g., Defs.' Mem. in Support of Mot. for S.J. at 8. Defendants also state that "Lee is an employee of the York County Schools. Any speech by him. . .is the speech of the York County Schools." Id. at 10. However, Defendants alluded to these principles in their application of the Tinker-Hazelwood standard for regulating teacher speech. See id. at 7-10. Boring was decided under the Pickering-Connick standard. See infra notes 14-16 and accompanying text.

fix the curriculum."[14] Id. at 370. Thus, any dispute over the

[14] The rationale underlying the principle that it is the school, not the teacher, that has the right to determine the curriculum is

> [T]hat the makeup of the curriculum [should] be entrusted to the local school authorities who are in some sense responsible [to the community], rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

Boring, 136 F.3d at 371. To grant constitutional protection to teachers' curricular choices

> Would remove from students, teachers, parents, and school boards the right to direct their educational curricula through democratic means. The curricular choices of the schools should be presumptively their own - the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.

Id. at 371-72 (Wilkinson, J., concurring). "'Legitimate' pedagogy [would] be not what the parents and schoolboards decide it should be but, rather, what the judges say it will be." Id. at 373-74 (Luttig, J., concurring). Therefore,

> The First Amendment does not require school boards to allow individual teachers in the Nation's elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views.

Id. at 372 (Luttig, J., concurring). See also Urofsky, 216 F.3d at 409-15 (discussing at great length that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors"). In Urofsky, the Fourth Circuit explained that its discussion of academic freedom pertained to universities, not to

content of the curriculum is a disagreement between the teacher and the employer-school that determines her employment duties. Id. at 369. The dispute "does not present a matter of public concern and is nothing more than an ordinary employment dispute." Id. at 368. The curricular speech at issue "does not constitute protected speech and has no First Amendment protection." Id. at 369.

Hence, curricular speech fails per se to be a matter of public concern. Vital to this analysis is the definition of "curricular speech." The Boring court first looked to a standard dictionary definition for determining what constitutes curriculum, finding it to comprise of "all planned school activities including, besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program." Id. at 367-68 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DISCTIONARY 557 (3d ed. 1971)). This sweeping definition shows that expressive activity can constitute curricular speech, because curricular speech is comprised of "all planned school activities," not merely formal instruction, and involves the teaching of matters other than specific "courses of study." See id. The Fourth Circuit also looked to Hazelwood to support the broad reach of the dictionary definition:[15]

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secondary schools, but only because academic freedom as it relates to high schools was not an issue before the court on that appeal. Id. at 409 n.8. However, there is no reason that the Fourth Circuit's analysis would apply any differently at the high school level, particularly in light of the rationale provided in Boring as to why it is the schools, and not the teachers, that have the right to set the curriculum.

[15] The Fourth Circuit looked to Hazelwood only to define "curriculum," and not for any guidance regarding the constitutional rights accorded teacher speech. Boring, 136 F.3d at 367-68.

> "The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart knowledge or skills to student participants and audiences."[16]

Boring, 136 F.3d at 368 (quoting Hazelwood, 484 U.S. at 271) (emphasis added). The language "other expressive activities" reveals that curricular speech encompasses a wide range of types of communication. The fact that the definition includes expressive activities that do not occur "in a traditional classroom setting" emphasizes that the expression need not involve the instruction of a specific

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[16] The quoted passage refers to "the imprimatur of the school." Hazelwood, 484 U.S. at 271. However, "Boring, of course, did not rest upon any such notion of official imprimatur. It rested, instead, as we said, solely on the firm belief that the teacher possessed no First Amendment right in the curriculum itself." Urofsky, 216 F.3d at 424 (Luttig, J., concurring). Thus, the issue is not whether the materials "bear the imprimatur of the school," but instead whether they are "expressive activities...supervised by faculty members and designed to impart knowledge or skills to student participants and audiences." See Hazelwood, 484 U.S. at 271.

course, as long as it "impart[s] knowledge or skills." See Hazelwood, 484 U.S. at 271.

Finally, curricular speech encompasses not only the content of the instructor's materials, but it also involves an instructor's teaching methodology:

> It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way.

Urofsky, 216 F.3d at 409. Teaching methodology is nothing more than an execution of a teacher's employment duties "in a specified way." See id. Thus, "teachers' First Amendment rights [do not] extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990). The First Amendment simply does not protect "teaching methods." Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir. 1973).

2. Applying Boring to Lee's Postings

The postings on Lee's classroom walls qualify as the type of materials that can constitute curricular speech. Lee's postings are expressive activities that convey ideas and themes through text, pictures, and symbols.[17] Moreover, Lee

[17] See Hazelwood, 484 U.S. at 271; see also supra notes 13-16 and accompanying text.

himself provides undisputed evidence that such materials can be used for instructive purposes. See Compl. at 4, ¶ 12 (stating that the school permits the posting of materials "that are consistent with the educational mission of the school"); Lee Aff. at 3, ¶ 11 (explaining that one reason he posts materials is "to educate and exemplify in a fair and complete treatment the religious traditions of various Hispanic and pre-Hispanic societies and those which embrace the Spanish language and culture") (emphasis added); Lee Dep. at 25 ("You could staple somebody's tie on the wall and relate it to the curriculum if you wanted to."). Thus, Lee can readily use the materials as tools of instruction. The question here is whether Lee's postings are in fact "designed to impart knowledge" and thus constitute curricular speech. See Hazelwood, 484 U.S. at 271. The postings are curricular speech in two ways. First, Lee used the materials as part of his methodology of instruction. Second, Lee seeks to instruct students on curricular matters through his postings.[18]

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[18] Principal Zanca, as well as Lee himself, repeatedly expressed that Lee's postings were not curricular. However, Zanca's opinion was based on his view that the postings did not relate to the teaching of Spanish by Lee. See Zanca Dep. at 7, 13-14, 17, 18-19, 23, 24, 30, 32, 36, 41, 45, 47, 50, 54, and 93-94. Thus, Zanca views as non-curricular any knowledge or skills imparted by Lee to his students that did not relate to Spanish. Moreover, although Lee disclaims that the materials relate to his instruction of Spanish, see, e.g., Lee Dep. at 17, other statements made by him explicitly show that he considered the materials to be part of how he taught Spanish, see infra at 15-16. However, the issue here is whether Lee expressed "curricular speech" as defined by the Fourth Circuit, not by Zanca or Lee. It is the Fourth Circuit's definition that sets the parameters of how the school is to execute its educational goals; to what extent the First Amendment does not interfere with that mission; and the degree by which Lee must accept that, as a public school teacher, it is the school's right to determine what is taught to the students. If Lee sought to "impart knowledge or skills," even if not related to Spanish, then he sought to

Lee explained that he used the materials as a means for catching his students' attention in order to teach Spanish:

> We are constantly trying to find something that will engage interest. They've got attention spans of 5 to 10 minutes, you have to put something that would lead them into a positive and continuing focus.

Id. at 83. Lee added that

> You've got to do more than nouns and verbs. You'd kill kids if it was grammar from the start of the year to the end. You've got to talk about interesting and fascinating things, and a mix of them at that, because they can get bored with one theme. I just found [the postings] interesting.

Id. at 87-88. Lee specifically sought materials "that engaged the kids." Id. at 28. In fact, Lee compared the usefulness of the posters to that of using a Neil Diamond song that kept his students focused during class. Id. at 83-84. Lee also sought to inspire his students to learn Spanish by demonstrating that acquiring a foreign language skill can be useful to their futures. Lee posted an article about an individual who attended a nearby high school and then joined a Christian mission in South America. Id. at 30-31. Lee

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instruct his students. Any such instruction is curricular speech belonging to the school and unprotected by the First Amendment.

posted the item because "there's [] an association [he] see[s] that the kids all find interesting." Id. at 61. He explained that

> It's highly relevant to me that a kid knows that somebody else in the area who studied Spanish and who tried to apply that Spanish to whatever vocation, she chose to be a missionary, but I would say that that would be altogether interesting to the average student in the classroom.

Id. at 34.

Therefore, Lee specifically used the materials to execute his teaching duties, and the postings are both part of his teaching methodology and his instruction on curricular matters. [19]

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[19] From both Defendants and Lee's perspectives, Lee's posters had the intent and effect of imparting knowledge to his students. Zanca constantly expressed the concern that Lee was "an employee endorsing, professing his beliefs in his classroom by way of posting." Id. at 54; see also id. at 17, 19, 42, 48, 50, 56, 58, and 62. The fact that this belief system is religious in nature is irrelevant to this matter. This case does not involve the Free Exercise of Religion clause of the First Amendment, but rather is a free speech case. As such, religious speech is not favored or disfavored relative to any other kind of speech. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-32 (1995). The only pertinent issue here is that Lee sought to use the postings to impart knowledge to his students.

Lee portrays the materials differently from Defendants and does not describe them as "endorsing" or "promoting" any belief system. However, his express intent in posting the materials is, for purposes of Boring, similar to Defendants' characterization. Lee explains that he is "accountable in that classroom for [the students'] welfare and their attitudes and their feelings, which are sensitive and fluctuate daily." Id. at 19. Thus, he placed the materials on his classroom walls in order to

3. Applying the Traditional Public-Concern Analysis to Lee's Postings

Even if Lee's postings are not curricular speech, they do not express matters of public concern under the first part of the Pickering-Connick analysis. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of [the speech], as revealed by the whole record."[20] Connick, 461 U.S. at 147-

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inculcate his students with positive messages and themes. Id. at 19, 20-21, 27, 34, 69, 76, 77, and 78. Consequently, he expressly sought to impart knowledge to the students. Moreover, Supreme Court case law makes clear that teaching these very type of messages and themes is specifically part of the school's curriculum. See, e.g., Ambach v. Norwick, 441 U.S. 68, 76-78 (1979); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683-86 (1986); Bd. of Educ. v. Pico, 457 U.S. 853, 863-69 (1982).

[20] When defining what constitutes a "matter of public concern," the Fourth Circuit has at times used broad language indicating that the phrase encompasses a wide range of subjects. For example, the Fourth Circuit has stated that "speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." Urofsky, 216 F.3d at 406; see also Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 353 (4th Cir. 2000) (stating that the issue is whether "a member of the community [would] be truly concerned with the employee's speech?"). However, when the Fourth Circuit has given content to the phrase "matter of public concern," it has considerably narrowed what survives the test. The "matter" or "issue" in question must be more than broad subject matter of general interest. The Fourth Circuit has specifically quoted Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1986), to explain that

> "Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. . . . The mere fact

48. With respect to content, "personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest," are not matters of public concern. Stroman, 981 F.2d at 156 (emphasis added). Important factors in analyzing the context of the speech include (1) if the speech was made in the workplace, or if it was expressed in a public forum, see Love-Lane v. Martin, 355 F.3d 766, 777 (4th Cir. 2004);[21] (2) whether the speech

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> that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment."

Dimeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995) (quoting Terrell, 792 F.2d at 1362); see also Harris v. City of Virginia Beach, 1995 U.S. App. LEXIS 30912, at *14-15 (4th Cir. 1995) (unpublished). Thus, a public concern inquiry "does not involve a determination of how interesting or important the subject of an employee's speech is." Urofsky, 216 F.3d at 407.

> Instead, because debate on topics of public concern is fundamental to the American system of government at all levels, Pickering is designed to ensure that a governmental entity does not use its personnel decisions to influence that debate. Statements that do not contribute to that debate are, consequently, afforded less protection against such governmental personnel decisions.

Arvinger v. Mayor of Baltimore, 862 F.2d 75, 78 (4th Cir. 1988). Thus, the inquiry generally concerns "whether the comment in question more closely resembles public debate or [a] private employment grievance." Id. The court looks into whether the speech "was [] made to further [] public debate" and if the government sought to "chill any part of that public debate." Id. at 79.

[21] This factor is not dispositive, however. An employee can choose to privately address a matter of public concern. Connick, 461 U.S. at 148 n.8.

was addressed to a public audience, see United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995); (3) if the speaker's intent to communicate the speech was "in any way political or involving any matter of concern to the public," Holland v. Rimmer, 25 F.3d 1251, 1255 (4th Cir. 1994); and (4) whether the speech was communicated in the context of a public debate about a specific issue, see Stroman, 981 F.2d at 158. As for form, various types of expression that have been factors in finding that an individual expressed a matter of public concern include a speech at a public meeting, see Love-Lane, 355 F.3d at 777; a letter to a local newspaper, Pickering, 391 U.S. at 574; and a presentation to members of the public, Edwards v. Goldsboro, 178 F.3d 231, 247 (4th Cir. 1999).

Not only does an analysis of all of these factors reveal that there is no genuine dispute that Lee's speech was not a matter of public concern, but there is no genuine dispute that each individual factor requires a finding for Defendants. The court starts with context — particularly with Lee's intent in posting the materials — because Lee has so thoroughly disclaimed that his speech is about anything other than a "matter[] of personal interest." See Stroman, 981 F.2d at 156. During his deposition, when asked why he put up the materials, Lee said point-blank, "first and foremost, I liked them. I liked the figures represented in them. [George Washington] is a childhood hero of mine. . . . I like them and I think they're interesting and, frankly, I just like them." Lee Dep. at 87. Specific examples demonstrate that the purpose underlying Lee's expressive activity was that the materials were personally interesting to him. When discussing the significance of putting up a poster of George Washington praying, Lee expressed that it "relates to me. I like it. I find

the image exceptionally positive and uplifting. . . . [because] the whole notion of faith to me is important." Id. at 17. Lee went on to explain that the poster is "nifty. It's got a colonial uniform on it and I like it." Id. at 18. Lee added that the poster is "a beautiful portrait. It's in line with our nation's traditions. I find it nifty." Id. at 19. He further explicated that his "interest in [the poster is that] it's the most colorful photograph in the room and it's cool. George Washington is a Virginian, I have always admired him like I do President Bush, despite his errors, and I like that poster." Id. at 89. When discussing why he posted articles on George Bush and John Ashcroft, he stated that "I like them. I respect and admire them. I feel that they're good guys. The article is interesting to me and positive and hope filled." Id. at 27. At least ten times in his deposition, Lee stated that he posted the materials because they were interesting to him. See Lee Dep. at 23, 24, 27, 34, 38, 41, 43, 61, 77, and 87. At least seven times, he offered as an explanation that he liked them. See id. at 17, 18, 19, 27, 28, 76, and 87. At one point, Lee compared the reason for putting up the posters to shopping:

> When something catches my eye and appeals to me, you know, like buying a new shirt, if I find it and I have room on the wall for it, I normally [post it] within thirty days of when I found it in the newspaper or a magazine, normally.

Id. at 28.

Lee posting these items because of his interest in the subject matter is no different from other teachers posting pictures of motorcycles and sports teams because they were interested in those subjects. See Zanca Dep. at 8. Other than

Lee's personal interest in the materials, absolutely no evidence points to any other reason for posting them except for those previously discussed: The materials aided in Lee's instruction of his students and were part of his teaching methodology.[22] Lee explained repeatedly that he hoped to inculcate his pupils with positive messages.[23] He also stated that he hoped the materials would keep his students interested in the subject matter and would retain their focus and attention.[24] As a public school teacher, Lee used these materials to help perform his job and to teach his students.

The other factors regarding context further demonstrate that Lee's speech does not touch on a matter of public concern. Lee posted his materials in his workplace, not in a forum where members of the public would become aware of his speech. Nor did Lee choose a private channel in which to express his views, with the hope that his message would eventually reach the public.[25] Furthermore, the intended audience was only his students — the very individuals around whom his employment duties revolve — and himself, not the public.

The content and form of the speech also reveal that Lee did not express a matter of public concern. The content

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[22] See supra notes 17-19 and accompanying text.

[23] See supra note 19.

[24] See supra at 15-16.

[25] As discussed, an employee can choose a private channel by which to speak to a matter of public concern. See supra note 21. However, the point is that though an employee might choose a private channel, the issue presumably would eventually, even if indirectly, come to the public's attention. In this case, there is no evidence that Lee intended for the general public to become aware of his postings outside of his classroom.

spoke to, at most, matters of general interest.[26] It did not involve any specific issue about which the community was debating. Nor did the content reveal any new information, such as matters of corruption or financial mismanagement, that would stimulate public discussion. Furthermore, the speech was not expressed in the form of a speech at a public meeting, or a letter to the editor, or a presentation to members of the public. The form was postings on walls at the workplace, which only students, co-workers, and other school employees would regularly view.

As a result of all of these undisputed facts, the court finds that there is no triable issue on whether Lee spoke to a matter of public concern.

4. Forum Analysis

Lee argues that Tabb created a designated public forum for teachers to express themselves on their classroom walls and classroom bulletin boards. See Pl.'s Mem. in Supp. of Mot. for S.J. at 9-12.[27] However, his argument legally

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[26] See supra at 19-20.

[27] The extent to which the government may regulate an individual's speech without violating his First Amendment rights depends on what kind of government property — or forum — in which the individual wishes to express himself. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983). The Court has identified three types of fora: the traditional public forum, the designated public forum, and the nonpublic forum. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). Traditional public fora are places, such as public streets and parks, which "by long tradition or by government fiat have been devoted to assembly and debate." Perry Educ. Ass'n, 460 U.S. at 45. In a traditional public forum, content-based regulations are subject to strict scrutiny. Id. Time, place, and manner regulations must be narrowly tailored to serve a significant government interest. Id. In a nonpublic forum, speakers enjoy the least First

describes a limited public forum because he contends that the forum is opened only to teachers, a limited class of speakers.[28] The Supreme Court has set forth considerable guidance for determining if the government has created a limited public forum. The Court has emphasized that "not every instrumentality used for communication. . .is. . .a public forum by designation." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 803 (1985). Rather, the inquiry determines whether the government made the property "generally available" and "generally open" for free expression or discourse. Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 679 (1998). Thus, "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802 (emphasis added). A plaintiff must show that the government had an "affirmative desire," id. at 805, and a "clear intent," Hazelwood, 484 U.S. at 270, to convert its property from its traditional purposes into a forum for open discussion.

Amendment protection: The government may issue any content-based or time, place, and manner regulation, so long as the restriction is reasonable and is viewpoint-neutral. Id. at 46. The Supreme Court has already found that public schools are nonpublic forums. Hazelwood, 484 U.S. at 267.

A designated public forum is a nonpublic forum that the government opens up to free expression of ideas, thus creating a public forum. Perry Educ. Ass'n, 460 U.S. at 45. The government's freedom to regulate speech is subject to the same First Amendment protection as afforded speech in a traditional public forum. Id. at 45-46. A limited public forum is a type of designated public forum in which the government opens up a nonpublic forum to free discourse, but "only to a limited class of speakers or for limited topics." Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999) (citing Perry Educ. Ass'n, 460 U.S. at 46 n.7).

[28] See supra note 27.

Various factors can demonstrate such an intent and desire. First, a court must analyze whether the government's "policy and practice" show that it intended to open up a nonpublic forum. Cornelius, 473 U.S. at 802. Second, a court should examine "the nature of the property and its compatibility with expressive activity." Id. "In cases where the principal function of the property would be disrupted by expressive activity, the [Supreme] Court [has been] particularly reluctant to hold that the government intended to designate a public forum." Id. at 804. Also relevant is whether individuals have free access to the forum, or if they are required to obtain governmental permission that is granted only on an individualized, non-ministerial basis. Forbes, 523 U.S. at 679-80. Finally, the Court has cautioned that finding a limited public forum too readily can produce the averse effect of reducing speech because the government, faced with a choice between allowing unlimited discourse or no discourse at all, might choose the latter. Forbes, 523 U.S. at 681. Finding a nonpublic forum under such circumstances can "encourage the government to open its property to [at least] some expressive activity." Id.

Lee argues that Tabb has created a limited public forum, in which "the relevant 'forum' is the school's classroom walls and bulletin boards which have been opened for private expression and speech by teachers." Pl.'s Mem. in Supp. of Mot. for S.J. at 10-11. The evidence in the record shows that there is no genuine dispute that Tabb has not created a limited public forum. The court starts its analysis with the undisputed fact that Tabb does not have a policy and practice of permitting open discourse by the teachers. Lee concedes that Tabb's practice and policy is to

allow teachers to post materials only if the materials are consistent with the school's educational mission, are not inconsistent with the school's educational mission, or relate to a student club the teacher sponsors. Pl.'s Compl. at 4, ¶¶ 12-14. These restrictions immediately demonstrate a policy to keep discourse restricted and controlled so as to not disrupt the school's function of educating students, as opposed to permitting open discourse over which the school would have little freedom to regulate. The evidence in the record proves that this restriction is a reality and not merely theoretical. The types of materials posted by Tabb teachers include pictures of family, motorcycles, sports teams, sports articles, sports figures, and famous quotes. Zanca Dep. at 8-9. Teachers also have posted comic strips and materials relating to hobbies such as arts and crafts. Lee Aff. at 1, ¶ 4. Clearly, these postings are of a limited and innocuous nature that, at most, speak to a narrow range of matters of personal interest. They do not demonstrate unlimited discussion, communication, or expression. Additionally, Zanca explained that a wide range of postings would be subject to removal, regardless of whatever expression or demonstration of personal interest they may possess. He stated that "there are a lot of things that would be inappropriate to post in a public classroom." Zanca Dep. at 11; see also Cornelius, 473 U.S. at 804 (citing as one factor against finding a designated public forum the fact that "the Government's consistent policy has been to limit participation in the [forum] to 'appropriate' voluntary agencies"). Zanca identified examples such as materials that include profanity, Zanca Dep. at 11; relate to substance abuse, id.; or are "offensive to students," id. at 19. Moreover, news articles and current event articles are posted, but usually only if they pertain to the teacher's subject matter, such as in a government or history classroom. See, e.g., id. at

82-83. Consequently, Tabb simply has not given its teachers freedom to express themselves in their classrooms in any way that they please.

In addition to the fact that Tabb has not created open discourse, there is also a practice for regulating the placement of materials on the wall. Zanca's policy is based on his experience that Tabb teachers have "good judgment," Zanca Dep. at 11, and that "most people in our profession know what's right and what's wrong," id. at 13. Zanca has "always had teachers that pretty much understood what probably should be posted in the classroom and what should not."[29] Zanca Dep. at 10. Thus, he has given his teachers "discretion" without requiring prior approval. Id. at 11. However, when a teacher does not know whether something is appropriate, the expectation and practice is that the teacher will visit Zanca to ask him about the posting. Id. at 13. Most importantly, Zanca retains complete discretion to remove any material from classroom walls that he deems objectionable. Staples Dep. at 30; Zanca Dep. at 52-53 and 56-57. The fact that expressive activity is subject to such unrestricted discretion is directly antithetical to the notion that the government created a limited public forum. See Forbes, 523 U.S. at 693 n.18 (Stevens, J., dissenting) ("It is the standardless character of the decision to exclude Forbes that provides the basis for the Court's conclusion that the debates were a nonpublic forum rather than a limited public forum.").

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[29] Lee has developed and cited no evidence disputing Zanca's statement that teachers have exhibited responsible judgment and line-drawing. There are no depositions from Lee or other teachers, students, parents, or witnesses indicating that inappropriate materials were posted in, or not removed from, other teachers' classrooms. Nor does the record include any administrative reports citing inappropriate materials, or any other kind of complaints. Thus, Zanca's assessment goes without contravention.

Moreover, Zanca's evaluation of materials is hardly ministerial. Rather, he makes individualized, case-by-case decisions, in which he scrutinizes the content of materials in context of the course an instructor teaches, and examines how the materials might relate to that course. Zanca Dep. at 46 (explaining that evaluation of a posting is based "on an item-by-item, case-by-case basis"); id. at 53 (stating that a decision to remove a posting is based on "my discretion, my determination, piece by piece, case by case"); id. at 101 ("You have to look at individual instances, individual events before you can make a determination."); see also id. at 13-15, 18-19, 21-22, 23-24, 40-41, 45-47, 64-66, and 93-94 (describing the process by which he evaluates a posting's content in context of how the content relates to the class being taught); supra note 18 (citing instances in which Zanca evaluated Lee's materials in context of the fact that he taught Spanish).

It is true that Zanca's policy is informal and not written down. However, a written policy, though indicative of an intent to not open up a forum, is not necessary for finding that the government did not intend to create a limited public forum. See Forbes, 523 U.S. at 692 (Stevens, J., dissenting) (noting that the majority found that there was no designated public forum although there were "no written criteria" guiding the governmental entity's decisions). The undisputed fact is that the policy works: The complaint about Lee's materials was the first time in Zanca's nine years as principal that he ever received a complaint. Zanca Dep. at 25-26. It is clear that Zanca has an effective, workable system for monitoring materials placed on the wall, and that this system creates limited discourse at most, not free expression.

There is simply nothing in the record that shows that Tabb has an "affirmative desire" and "clear intent" to make its classroom walls and bulletins "generally available" for free and open expression by its teachers. Instead, the permitted expressive activity is limited and demonstrates only "selective access." See Forbes, 523 U.S. at 679. Moreover, finding a designated public forum and a violation of First Amendment rights could produce less expressive activity, as Tabb might find it necessary to prevent all teachers from expressing themselves in order to eliminate the designated public forum and to preserve control within the school's walls. See Forbes, 523 U.S. at 681.

Examining "the nature of the property and its compatibility with expressive activity" further reveals that Tabb has not created a limited public forum. See Cornelius, 473 U.S. at 802. The Supreme Court has long emphasized "the special characteristics of the school environment." See Tinker, 393 U.S. at 506.[30] The importance of expressive activity "must be balanced against the society's countervailing interest in teaching students" and inculcating youth with fundamental societal values. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986). Consequently, it is essential to consider the "sensibilities" of young students. Id. Moreover, "teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and

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[30] Although the court cites Tinker and other cases regarding student speech, it does not look to these cases for guidance as to the extent of a teacher's First Amendment rights when expressing himself in a school setting. Rather, it looks to these cases for other purposes: Just as the Fourth Circuit examined Hazelwood to define curriculum, see Boring, 136 F.3d at 368, the court reviews these cases here to analyze the nature of school property.

deportment in and out of class. Inescapably, like parents, they are role models." Id. at 683. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." Hazelwood, 484 U.S. at 266 (internal citation omitted). "The determination of what manner of [student] speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." Id. at 267 (internal citation and quotation marks omitted).

Although these cases deal with student speech, they demonstrate that the school setting is an environment that requires regulation of speech delivered within its walls.[31] Clearly, the nature of school property cautions against finding that a school has created a limited public forum and permits largely unrestricted discourse that could so easily disrupt the school's ability to execute its teaching function.[32] This factor, as well as each of the factors addressed above,

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[31] See supra note 30.

[32] As a Boring concurrence explained:

> Were every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes . . . the Nation's school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers.

Boring, 136 F.3d at 373 (Luttig, J., concurring). Although this assessment was made in a context different from forum analysis, it explains why school property is incompatible with the government creating a limited public forum.

makes it clear that there is no genuine dispute that Tabb has not created a limited public forum on its classroom walls and classroom bulletins.

5. Lee's Remaining First Amendment Arguments

Lee argues that the removal of the materials constituted viewpoint discrimination. Pl.'s Memo. in Supp. of Mot. for S.J. at 12-15. Lee further contends that the removal was unconstitutional because Zanca acted with unbridled discretion and there were no explicit standards guiding his decisions. Id. at 15-19. However, the Court has found that Lee fails the first step under Pickering-Connick because the materials are curricular speech, or, alternatively, because the speech does not implicate a matter of public concern under a conventional Pickering-Connick analysis. At the point that the court determines that the employee's speech does not address a matter of public concern, the speech is not protected by the First Amendment. See Stroman, 981 F.2d at 156. The court need not "scrutinize the reasons for" the regulation, Connick, 461 U.S. at 146, and it terminates its inquiry, Edwards, 178 F.3d at 246. See also Nat. Treasury Employees Union, 513 U.S. at 467 n.12 (citing Arnett v. Kennedy, 416 U.S. 134, 158-61 (1974) (plurality)) (explaining that a plurality in an earlier decision stated that the vagueness doctrine does not apply to unprotected employee speech). In fact, it would be inappropriate for the court to evaluate the regulation because it would result in "intrusive oversight," Connick, 461 U.S. at 146, that would interfere with the effectiveness of the government-employer's operations and delivery of services, Waters, 511 U.S. at 671-75 (plurality). Thus, "the state, as employer, may

regulate [the speech] without infringing any First Amendment protection." Urofsky, 216 F.3d at 406.[33]

III. Lee's Other Claims

1. Equal Protection Claim Under the Fourteenth Amendment of the United States Constitution

Lee's Third Claim asserts that Tabb violated his equal protection rights under the Fourteenth Amendment of the United States Constitution. Pl.'s Compl. at 11-12, ¶¶ 49-54. This claim is based entirely on his First Amendment free speech claim. He argues that "Zanca singled out Lee's expression because it contained religious references and themes." Pl.'s Br. in Opp'n to Defs.' Mot. for S.J. at 13. Because Zanca permitted postings based on other viewpoints, but not Lee's, "this kind of disparate treatment on the basis of viewpoint not only violates the First Amendment, but also violates the Equal Protection Clause." Id.

Lee's arguments merely recast his First Amendment arguments as an equal protection claim. He does not contend that he was treated disparately in any way other than through alleged discrimination against his viewpoint. If a plaintiff's free speech claim fails, and an equal protection claim is "a mere rewording of [a] First Amendment [] claim," then the equal protection claim also must fail. See Edwards, 178 F.3d at 250. In short, Lee asks this court to do under the Fourteenth Amendment what he asks it to do under the First

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[33] See also supra notes 10-12 and accompanying text (discussing the court's responsibilities once it determines that a government employee's speech does not touch on a matter of public concern).

Amendment: to evaluate the constitutionality of an employer-school's regulation of an employee-teacher's speech. Just as it was inappropriate to conduct such a review under the Free Speech Clause because Lee's speech does not implicate a matter of public concern, it would be inappropriate to do so under the Equal Protection Clause. Otherwise, the court would eviscerate Pickering-Connick *'s* guarantee that a public employer may regulate its employee's conduct to ensure the effective performance of its operations. Thus, as there is no genuine dispute of a material fact with respect to Lee's free speech claim, there is no genuine dispute of a material fact with respect to Lee's equal protection claim. Both claims fail as a matter of law.

2. Free Speech and Equal Protection Claims Under the Virginia Constitution

Lee's Second Claim alleges that Tabb violated his free speech rights under Article I, Section 12 of the Virginia Constitution.[34] Pl.'s Compl. at 11, ¶¶ 44-48. His Fourth Claim alleges that Tabb violated his right to equal protection under the law as guaranteed by Article I, Section 11 of the Virginia Constitution.[35] Pl.'s Compl. at 12-13, ¶¶ 55-59. The

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[34] Article I is the Virginia Constitution's Bill of Rights. See Va. Const. Art. I. Section 12 provides that

> The General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

Id. at § 12.

[35] Section 11 states that

Virginia Supreme Court has rejected the argument that the Virginia Constitution provides greater free speech protection than does the United States Constitution. Elliott v. Commonwealth, 267 Va. 464, 473-74, 593 S.E.2d 263 (2004). Rather, the free speech rights guaranteed by the Virginia Constitution are "coextensive" with the protections of the United States Constitution. Id. The Virginia Supreme Court also has held that Article I, Section 11 "is no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707 (1973). Therefore, just as there is no genuine dispute of a material fact regarding Lee's claims under the United States Constitution, there are no triable issues with respect to Lee's claims under the Virginia Constitution.

IV. Conclusion

For the reasons set forth above, Defendants' motion for summary judgment is **GRANTED** and Lee's motion for summary judgment is **DENIED.** The Clerk is **DIRECTED** to send a copy of this Opinion and Final Order to plaintiff and to counsel for defendants.[36]

IT IS SO ORDERED.

> The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged.

Va. Const. Art. I, § 11.

[36] An index of this Opinion is attached as Exhibit A.

/s Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 23, 2006

Exhibit A

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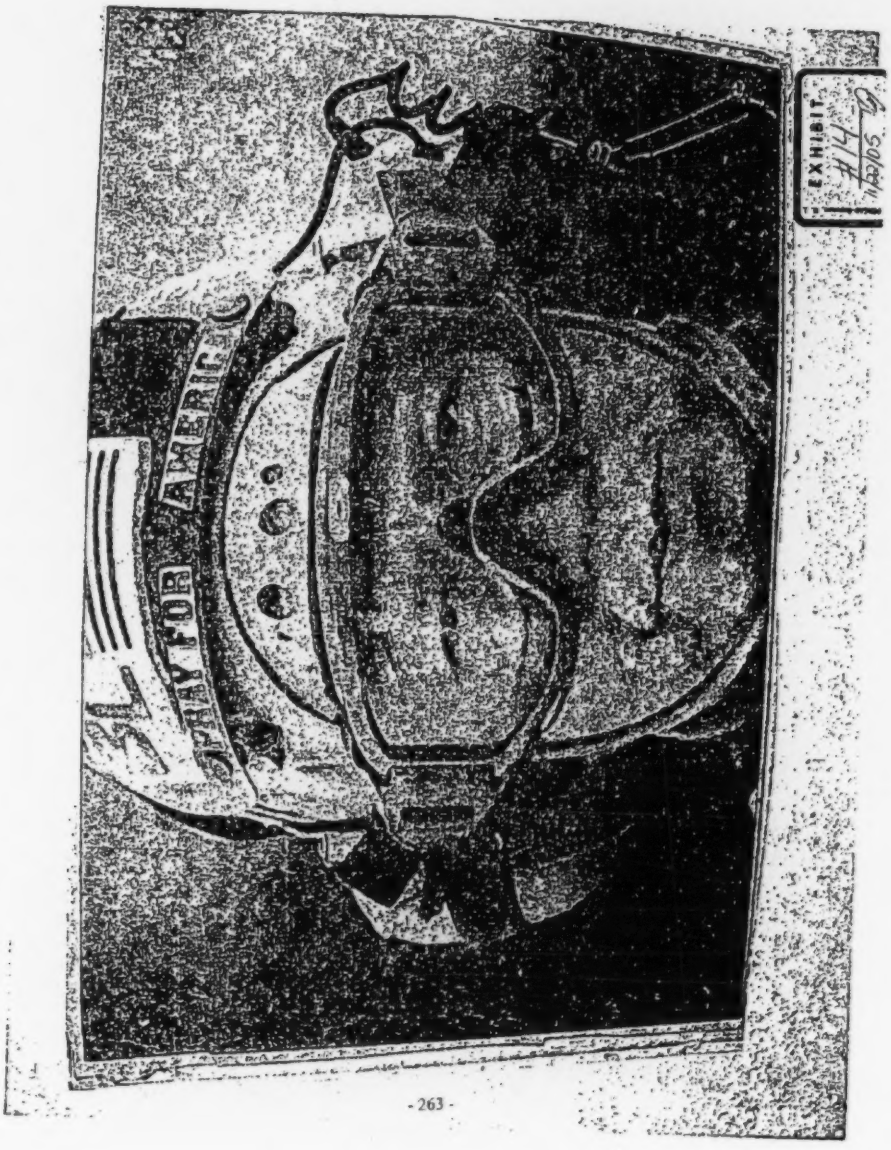
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Washington

White House staffers gather for Bible study

Voluntary meetings embrace president's emphasis on faith

By Judy Keen
USA TODAY

WASHINGTON — President Bush talks openly and proudly about his active spiritual life. It's another sign of the religious dynamic that permeates the administration. Some White House staffers have been meeting weekly at 6 a.m. for prayer and Bible study sessions.

Participation is entirely voluntary, but his invitation that the group meets during the lunch hour on Thursdays. Attendance is voluntary and although the leaders are Christians of varied denominations are welcome.

Typically 25 to 30 senior White House officials, including Chief of Staff Andrew Card, Counselor Karen Hughes, communications director Dan Bartlett, attorney Harriet Miers and other Cabinet secretaries gather in the Eisenhower Executive Office Building, an annex just across the West Wing that houses the offices of the President, Cheney and other administration officials.

Federal workplace restrictions eased in 1997 permit religious activities like those organizers say, to ensure that employees do not feel coerced to participate.

Barry Lynn, executive director of Americans United for Separation of Church and State, says such groups have ruled that religious study or public meetings in offices are unconstitutional.

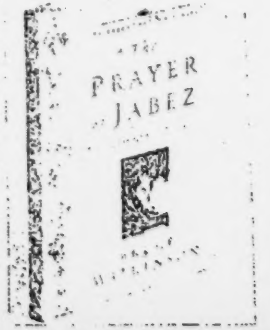
"If there's equal treatment among people who don't mind and there's no pressure, that's fine," Lynn says. "But I'm not aware of any exception from anyone at the White House."

Controversy erupted last year when The Washington Post reported that Attorney General John Ashcroft would daily invite aides of the future Supreme Court Justice to join him and they did so frequently. Ashcroft says he invited them because he knew and liked and they enjoyed fellowship.

The group kicked off their current Bible study meetings, The Post's White House reporter said, Andy Card, who, with Ashcroft, is a member of a Methodist church near Washington.

Those have been called Bible study classes in previous administrations.

In demand: Jabez author Bruce Wilkinson speaks at a White House Bible study.



Advice and repent: As many Christians do, some say they've joined the group out of a sense of duty.

LIFE

The 'God-gap'

President Bush brings his faith with him to work

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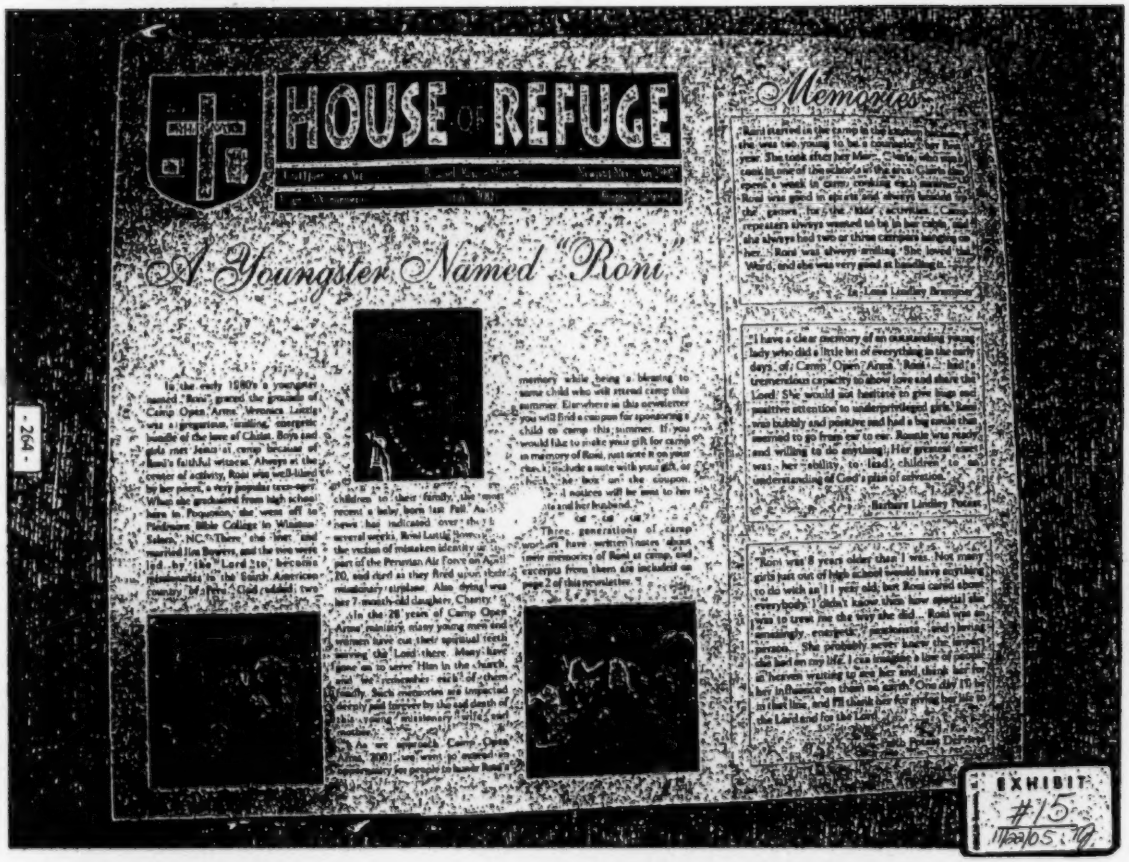
Lee



HOUSE OF REFUGE

Memories

A Youngster Named "Roni"

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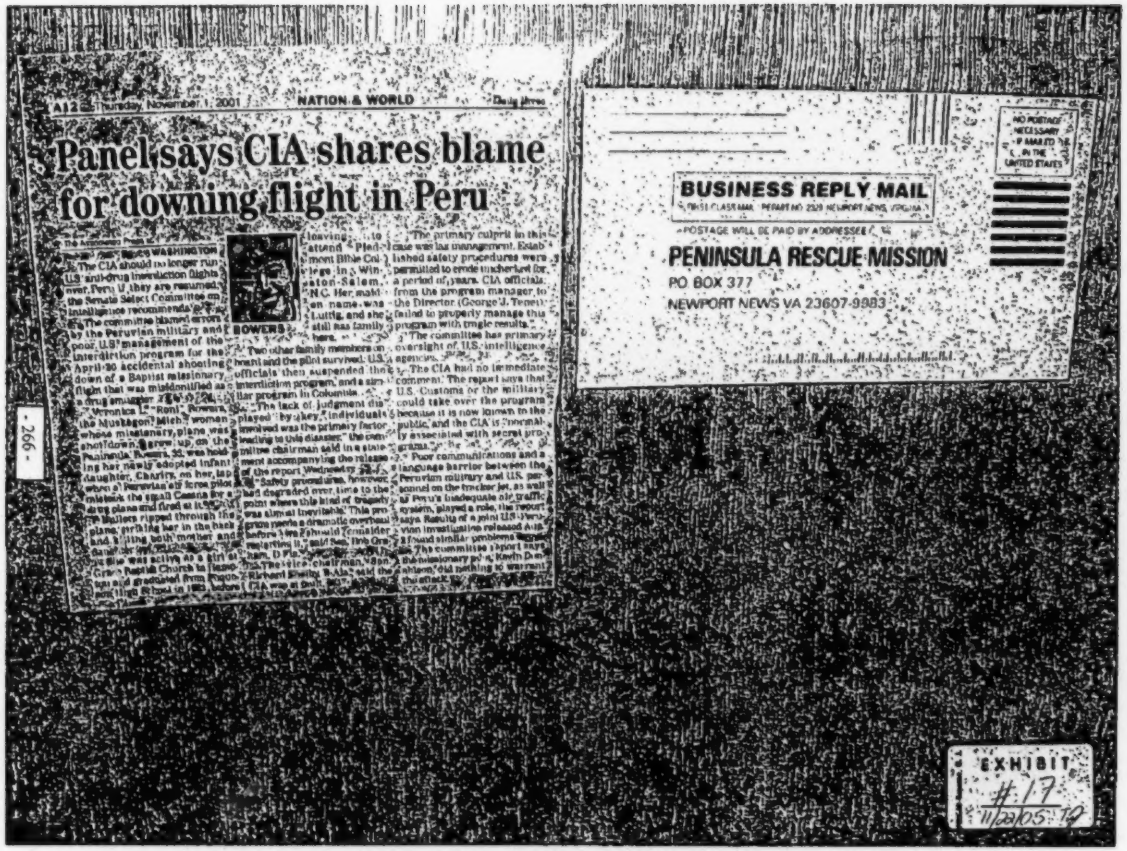

A12 Thursday, November 1, 2001 NATION & WORLD Daily Press

Panel says CIA shares blame for downing flight in Peru

WASHINGTON (AP) — The CIA should no longer run U.S. anti-drug interdiction flights over Peru if they are resumed, the Senate Select Committee on Intelligence recommends in a report.

The committee blamed errors by the Peruvian military and poor U.S. management of the interdiction program for the April 20 accidental shooting down of a Baptist missionary flight that was misidentified as a drug smuggler.

Veronica L. "Roni" Bowers, the Muskegon, Mich., woman whose missionary plane was shot down in Peru, grew up on the Peninsula. Bowers, 32, was holding her newly adopted infant daughter, Charity, on her lap when a Peruvian air force pilot mistook the small Cessna for a drug plane and fired at it. Machine gun bullets ripped through the plane, perforating her in the back and killing both mother and daughter, the report said.

She was active as a girl at Grace Baptist Church in Hampton and graduated from Hampton High School in 1983, before leaving to attend Piedmont Bible College in Winston-Salem, N.C. Her maiden name was Luttig, and she still has family here.

BOWERS

Two other family members on board and the pilot survived. U.S. officials then suspended the interdiction program, and a similar program in Colombia.

"The lack of judgment displayed by many individuals involved was the primary factor leading to this disaster," the committee chairman said in a statement accompanying the release of the report Wednesday. But safety procedures, however, had degraded over time to the point where this kind of tragedy was almost inevitable. This program needs a dramatic overhaul before it is allowed to resume operations," said Sen. Bob Graham, D-Fla.

The vice chairman, Sen. Richard Shelby, R-Ala., said the CIA was at fault, but the primary culprit in this case was bad management. Established safety procedures were permitted to erode unchecked for a period of years. CIA officials, from the program manager to the Director (George J. Tenet), failed to properly manage this program with tragic results."

The committee has primary oversight of U.S. intelligence agencies.

The CIA had no immediate comment. The report says that U.S. Customs or the military could take over the program because it is now known to the public and the CIA is "normally associated with secret programs."

Poor communications and a language barrier between the Peruvian military and U.S. personnel on the tracker jet, as well as Peru's inadequate air traffic system, played a role, the report says. Results of a joint U.S.-Peruvian investigation released Aug. 1 found similar problems.

The committee's report says the missionary pilot, Kevin Donahue, "did nothing to warrant the attack."

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ONE NATION UNDER GOD
"The face of prayer has changed. The need for prayer has not."
National Day of Prayer
Thursday, May 3, 2001
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SUPREME COURT, U.S.

No. 07-140

In The

Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a school principal, charged with supervising the posting of materials on the walls of a public high school classroom, which walls are available for use only by school teachers, may properly regulate a teacher's curricular postings on those walls.

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INTRODUCTION

This case arises from a school principal's proper removal of curricular materials posted on a bulletin board in a public classroom. Petitioner William Lee, a Spanish instructor at Tabb High School in York County, Virginia, posted a number of items of a religious nature on the walls of his classroom, in which attendance is compulsory. These items included: (1) a 2002 National Day of Prayer poster, featuring George Washington kneeling in prayer; (2) a May 15, 2004 *Daily Press* news article entitled "The God Gap," outlining religious and philosophical differences between President Bush and Democratic candidate John Kerry; (3) an October 14, 2002 *USA Today* news article entitled "Whitehouse Staffers Gather For Bible Study," describing how then Attorney General Ashcroft led members of his staff in voluntary Bible study sessions; (4) a November 1, 2001 *Daily Press* news article detailing the missionary activities of a former Virginia high school student, Veronica Bowers, who died when her plane was shot down in South America; and (5) a June 2001 Peninsula Rescue Mission news letter, highlighting Bowers' work, and providing the address to which donations might be sent in support of the Mission.

After receiving notice from York County School administrators that a citizen had complained about the religious nature of items posted within Lee's classroom, Principal Crispin Zanca went to Lee's classroom to discuss the matter with him. Lee happened to be out sick that day. Zanca examined the

items posted on the bulletin board and removed the referenced items and placed them upon Lee's desk in the teacher's lounge with an explanatory note. Exercising his judgment, Zanca did not remove other materials posted on the bulletin board, most of which had discernible ties to Lee's Spanish classes.

Analyzing cross motions for summary judgment, the trial court, relying upon *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (*en banc*), applied the Supreme Court's *Pickering-Connick* analysis to assess whether Lee's posting constituted speech protected by the First Amendment of the United States Constitution. *See Lee v. York County School Division*, 418 F. Supp. 2d 816, 822 (E.D.Va. 2006); *see also*, *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Concluding that the removed items were, as a matter of law, curricular in nature, the trial court determined that the items were not a matter of public concern and therefore not entitled to First Amendment protection. *See Lee*, 418 F. Supp. 2d at 825-829.

On appeal, in a thorough opinion which outlined the analytical framework and precedent governing "teacher speech," the United States Court of Appeals for the Fourth Circuit affirmed the decision of the trial court, determining that the postings were curricular in nature as a matter of law, were not on a matter of public concern, and therefore not entitled to protection under the First Amendment to the United

States Constitution. *See Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007). Contrary to Petitioner's assertions, the Fourth Circuit's opinion is wholly consistent with this Court's decisions and the Constitution, and there is nothing novel or unresolved that warrants this Court's review.

STATEMENT OF THE CASE

The underlying facts are not in dispute as both parties filed motions for summary judgment. An accurate and fair summary of the case is set forth in Judge King's panel opinion:

> Lee maintains on appeal that he can post any materials he wishes on the classroom bulletin boards provided that, in so doing, he speaks not as a teacher, but instead as a private citizen only. He thus maintains that the fact he posted the Removed Items in his classroom is irrelevant to the issue of whether he was acting as a private citizen or as a school teacher. Lee further contends that each of the Removed Items constitutes speech concerning a public matter, because each item involves either a political issue or a matter of interest to the community. He emphasizes that, notwithstanding their religious overtones, the Removed Items involved political information and issues (*e.g.*, the article "The God Gap," explaining information on presidential candidates; the article "White House Staffers Gather For

Bible Study," outlining activities of an Attorney General; and the National Day of Prayer poster, advertising a Presidential Proclamation) and matters of general community interest (*e.g.*, the articles concerning a local woman killed in a plane crash).

Contentions such as these might normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern. In this case, however, Lee's contentions fail to take account of important considerations of precedent. Court's have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums.

Of additional importance, the enhanced right of a school board to regulate the speech of its teachers in classroom settings is supported by the Supreme Court's explicit recognition that *First Amendment* free speech rights in a school environment are not "automatically co-extensive with the rights of adults in other settings." As the *Hazelwood* Court explained, the exercise of such rights "must be applied in light of the special characteristics of the school environment." Put simply, our school systems are responsible for adequately and properly educating our youth. A school board carrying out this vital responsibility is entitled to some enhanced control

> over expressions within its classrooms, so that it can "assure . . . that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Thus, "[a] school need not tolerate student [or teacher] speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."

Lee, 484 F.3d at 694-696.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the decisions of this Court, the Fourth Circuit Court of Appeals, or the United States Constitution; nor does it create a conflict with decisions from other Circuit Courts of Appeals. The Fourth Circuit correctly construed and applied governing precedent. Indeed, while there is no other appellate case directly on point, a closely analogous case from the Ninth Circuit fully supports the decision below. *See Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1005 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S. Ct. 1653, 149 L. Ed. 2d 636 (2001) (upholding the removal of teacher posted materials on the *outside* of his classroom door).

I. Lee's Postings Constituted Curricular Speech That Is Not Protected by the First Amendment

The District Court and the Fourth Circuit Court of Appeals properly determined that the materials posted by Lee were curricular in nature. Although Lee opined in his deposition that these items were not curricular, the materials were posted by Lee in a classroom setting in which his minor students' attendance was compulsory. Lee did not post these materials outside of his office door, or even in his office itself. And, with these postings, Lee was not writing a letter to the local newspaper, the student newspaper, or expressing himself during free period in the hallways, the lunchroom, or on the front walk. Rather, Lee posted these materials *within* the classroom setting, thus rendering them curriculum related. Moreover, Lee admitted in his deposition that part of the reason he posted the materials was to impart knowledge or ideas to his students. *See Lee*, 418 F. Supp.2d at 825-826. In that regard, in a classroom where attendance is compulsory, Lee's postings carried the imprimatur of the school. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

The District Court and the Fourth Circuit Court of Appeals reached the conclusion that the materials were curricular after examining Lee's deposition testimony in detail, and noting a number of instances in which he explained his teaching methodology, and his desire to post materials in order to engage his students' attention. *See Lee*, 484 F.3d at 691, 697-700.

Lee's use of these materials to accomplish his teaching goals renders the materials curricular, regardless of their direct link to the topic being taught.

The District Court and the Fourth Circuit Court of Appeals then correctly concluded that the appropriate standard for reviewing the First Amendment rights of a teacher-employee in a public school setting is the *Pickering-Connick* standard. *See Lee*, 418 F. Supp. 2d at 822, *aff'd*, 484 F.3d at 693-694; *see also*, *Boring*, 136 F.3d at 371; *Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138; *Chiras v. Miller*, 432 F.3d 606, 617 (5th Cir. 2005). As the District Court aptly noted, this case is "not about what free speech rights Lee has as an individual expressing himself on private property. Rather, this case is a question about what free speech rights Lee has as a public school teacher-employee." *Lee*, 418 F. Supp. 2d at 821-822.

Contrary to Lee's assertions, this Court's recent decisions confirm that the Fourth Circuit correctly analyzed Lee's classroom "speech" under the *Pickering-Connick* standard. *See Tennessee Secondary School Athletic Assoc. v. Brentwood Acad.*, 127 S. Ct. 2489, 2495, 168 L. Ed. 2d 166, 173 (June 21, 2007) (citing, *Connick* for the proposition that "the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights. . . ."); *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958, 164 L. Ed. 2d 689, 698-99 (2006) (analyzing an employee's retaliation claim based upon the employee's speech under the *Pickering* analysis). Indeed, this Court reiterated in *Garcetti* that public

employees who "make statements pursuant to their official duties . . . are not speaking as citizens for first amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetii*, 126 S. Ct. at 1960, 164 L. Ed. 2d at 701.

Furthermore, Lee's reliance upon this Court's most recent school speech case, *Morse v. Frederick*, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (June 25, 2007), is misplaced. First, *Morse* addresses student, and not teacher, speech. Second, this Court reiterated in *Morse* that "schools may regulate some speech 'even though the government could not sensor similar speech outside the school.'" *Morse*, 127 S. Ct. at 2627, 168 L. Ed. 2d at 301.

Lee challenges the Fourth Circuit's ruling by contending that even under the *Pickering-Connick* analysis, his expression was nevertheless protected because it related to matters of public concern. Both the District Court and the Fourth Circuit Court of Appeals correctly concluded, however, that Lee's speech was not a matter of public concern, noting that Lee himself had stated repeatedly in his deposition that he posted the materials at issue because *he* liked them. Furthermore, the balancing test used to analyze matters of public concern under the *Pickering-Connick* doctrine likewise requires the removal of the materials.

The *Pickering-Connick* standard requires a two-step analysis. First, the court must determine whether the speaker is a private citizen addressing

an issue that is of public concern. *See Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000). Whether a citizen was speaking as a private citizen is answered by determining "whether the speech is 'made primarily in the [employee's] role as a citizen or primarily in his role as an employee.'" *Id.*, at 407 (quoting *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)); *see also, Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (finding an assistant district attorney who drafted an internal memo and testified to its contents pursuant to his official duties is not speaking as a citizen for First Amendment purposes).

In this case, Lee's speech was posted on the walls of the classroom in which he was assigned to instruct public high school students. His speech was not that of his personal opinions made in letters to the editor, letters to the school newspaper, or in any other manner that would give rise to a conclusion that these postings were private speech on a matter of public concern. Rather, Lee's postings were solely, by his own admission, designed to be seen by and to engage his *students*, and encourage them to learn or consider things he deemed important. Lee may have utilized only materials that he personally enjoyed, but he did so in the classroom for the purpose of grabbing the attention of students within the curricular setting, not the public at large. Lee may not "shed [all his] constitutional rights to freedom of speech or expression at the schoolhouse gate" *see Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506, 89 S. Ct.

733, 21 L. Ed. 2d 73 (1969), but in the context of his posting materials on a *classroom* bulletin board, to impart messages to his students, he is plainly acting as a teacher-employee whose conduct may (and in this matter had to) be regulated by his employer.

Moreover, Lee's postings do not constitute speech on a matter of public concern, and therefore they are afforded no Constitutional protection. *See Stroman v. Colleton County School Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). It is important to note that Lee seeks to have this issue addressed in his favor, inconsistently, both ways. First, he asked the appellate court to determine that speech posted by a school teacher in his classroom for the purpose, at least in part, of instructing his students and encouraging their attention is nonetheless private speech. *See Lee*, 484 F.3d at 694. However, recognizing that private citizen speech on a matter of private concern is not protected by the First Amendment, Lee next urges this Court to find that his speech, though private, was on a topic of public concern. *See id.* at 695. Lee is wrong on both counts.

By Lee's own admission, he posted these materials not only to engage his students, but because of his desire to demonstrate his own *personal* and deeply held religious faith, and his desire to witness that faith to his students. Thus, although Lee's speech was curricular in that he made the postings to attract the attention of his students, such that the speech was not on a matter of public concern, it also was done to

express and promote his own personal religious views, confirming its non-public nature.

II. Lee's Postings Were Not Protected Speech in a Nonpublic Forum and Were Not "Censored" on the Basis of Viewpoint in Violation of the First Amendment

Although not specifically addressed by the Fourth Circuit Court of Appeals, the District Court also correctly concluded that the School Board had not created a designated public forum for Lee to express himself through the classroom walls. *See Lee*, 418 F. Supp.2d at 829-833. In examining whether a limited public forum has been created, a court must look to whether or not the Government has made the property "generally available" for free expression purposes. *E.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679, 887 S. Ct. 1633, 1642, 140 L. Ed. 2d 875 (1998); *see also*, *Widmar v. Vincent*, 454 U.S. 263, 264, 102 S. Ct. 269, 272, 70 L. Ed. 2d 440, 444 (1981). A limited public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567, 580 (1985). In order to demonstrate that a limited public forum had been created, Lee was required to allege and prove that the school had a clear intent to open the forum to limited public discourse. *See Hazelwood School Dist. v.*

Kuhlmeier, 484 U.S. 260, 270, 108 S. Ct. 562, 569, 98 L. Ed. 2d 592, 605 (1988).

As the District Court correctly noted, though, Lee himself admitted that teachers were the only ones permitted to post materials upon the classroom walls. *See Lee*, 418 F. Supp. 2d at 829. Furthermore, Lee's postings were designed to reach the limited audience of his students, whose attendance in that classroom was compulsory. Finally, the only evidence before the District Court was that not all materials could be posted by teachers upon classroom walls. Principal Zanca testified that profanity, materials related to substance abuse, or other materials offensive to students could not be posted. Zanca also testified that the Principal retained discretion to disapprove of materials posted within classrooms. Lee did not present any evidence in conflict with Zanca's testimony on this topic. *See id.* at 831-832. As a result, the District Court correctly concluded that the School Board had not created a limited public forum and also correctly held that the school could control the content of these materials.

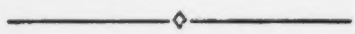
III. The School Properly Limited Lee's "School Sponsored" Speech in Order to Comply with the Establishment Clause

Even if Lee's speech is deemed school sponsored speech, the school's actions did not violate Lee's Constitutional rights and indeed were required under the Establishment Clause. School sponsored speech is

analyzed using the Supreme Court's analysis in *Kuhlmeier*, 484 U.S. at 270-271, 108 S. Ct. at 569-570, 98 L. Ed. 2d at 604-605. Under *Kuhlmeier*, the school "may exercise editorial control over speech at a public high school, 'so long as [its] actions are reasonably related to legitimate pedagogical concerns.'" *Fleming v. Jefferson County School Dist.*, 298 F.3d 918, 923-24 (10th Cir. 2002) (quoting *Kuhlmeier*, 484 U.S. at 272, 108 S. Ct. at 571, 98 L. Ed. 2d at 606). Where the school has not opened up a forum to "indiscriminate use," it can regulate the content of the forum in "any reasonable manner." *Kuhlmeier*, 484 U.S. at 270, 108 S. Ct. at 569, 98 L. Ed. 2d at 605. The school's restrictions are not required to be viewpoint neutral because schools must "retain the authority to refuse to sponsor [student] speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy." *Fleming*, 298 F.3d at 928. Ultimately, the *Fleming* Court determined that a school does not violate First Amendment rights by prohibiting religious references on tiles posted in the hallways of a public high school. *Id.* at 934. Doing so, the *Fleming* Court determined, conveyed a level of approval of the message, and the school had a legitimate pedagogical concern "to avoid the divisiveness and disruption from unrestrained religious debate . . ." *Id.* at 930-932.

Here, not only is Lee's speech, exhibited in his classroom while instructing students in a compulsory setting, curricular and that of the school itself, but

Tabb High School plainly had a legitimate pedagogical concern in preventing speech that Lee himself admits was designed to promote his personal religious faith. The speech occurred in the classroom, not an open public forum. And, critically, Lee admits that the speech was not directly related to the content of his instruction, and further admits that he posted these materials to demonstrate his own personal faith and to encourage his students not to be ashamed of theirs. An independent review of these materials in the context in which they were presented requires the conclusion that, at least in part, they were placed on the walls in an effort to promulgate certain personal religious beliefs. Lee's deposition admissions confirm this conclusion. Under these circumstances, the school not only had a legitimate interest in removing the materials, but was required to do so, to prevent the endorsement of one religion by a school employee in a classroom setting.[1]



[1] That Principal Zanca let other posted materials remain does not help Lee's contentions. Zanca exercised his best discretion, as he is charged to do, and removed those materials he believed violated the Establishment Clause; that he arguably should have removed other materials doesn't factually or legally transform the removed materials into protected speech.

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The arguments presented in the Respondents' Brief in Opposition only confirm the need for this Court to grant certiorari. The Respondents wholly fail to address the conflicting standards applied to teacher expression among the Circuits, let alone the readily transparent gap between the Fourth Circuit's effective ban on all in-school teacher expression, and this Court's directly conflicting statements in *Morse v. Frederick*, 551 U.S. __, 127 S. Ct. 2618 (2007), and *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393

U.S. 503 (1969), that teachers do not shed their rights to free expression at the schoolhouse gate.

I. RESPONDENTS HAVE FAILED TO JUSTIFY THE FOURTH CIRCUIT'S EFFECTIVE BAN ON IN-SCHOOL TEACHER EXPRESSION.

Avoiding the myriad and conflicting standards applied to teacher expression among the Circuits, Respondents simply argue that the Fourth Circuit had it right, i.e., anytime a teacher seeks to "impart knowledge" to students, the communication is "curricular" in nature and unprotected by the First Amendment. But this standard means that literally *any*, and *all*, teacher communication is subject to unrestrained censorship, retaliation or punishment at the whim of school officials, notwithstanding governmental policies to the contrary. The argument flies in the face of statements in *Morse* and *Tinker* that teachers do not shed their constitutional rights or freedom of expression at the schoolhouse gate. *Morse*, 127 S. Ct. at 2625; *Tinker*, 393 U.S. at 506. It also conflicts with standards applied in other Circuits. See cases cited in Petition for Certiorari, pp. 17-18. And it contravenes established precedent against viewpoint discrimination when governmental policies expressly permit speech. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995).

Seeking further to avoid substantive concerns, Respondents advance the hyperbolic argument that Lee seeks the right "to post any materials he wishes on the classroom bulletin boards[.]" (A-14). This simply is not true. The claims made in the Complaint in this case relate solely to the materials removed by Principal Zanca; at no time did Lee seek relief barring school officials from interfering with any and all postings in his classroom, nor does he now. JA 17. The Complaint, and the arguments advanced during the litigation, were limited to seeking a determination that the removal of *these materials* constituted viewpoint discrimination. A decision favoring Lee in this case would not grant teachers *carte blanche* to post materials in their classroom but would simply recognize that when schools, as in this case, have a policy, practice and custom of allowing teacher expression, that expression may not be subjected to impermissible viewpoint discrimination.

Respondents also tender the preposterous argument that because Lee personally liked the postings, his expression does not relate to a "matter of public concern" under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). (Brief in Opposition at 8). This distinction is blind to common sense and otherwise is without precedent. There is no valid reason, and certainly no precedent, holding that a "matter of public concern" cannot concurrently be a matter of "personal" interest for purposes of *Pickering* and

Connick. Indeed, it would be the rare and unusual person who would engage in expression on matters of public concern without having some personal interest in those matters. The Court of Appeals specifically recognized that but for the sweeping "curricular" speech test it applied, Lee's contention that his postings related to matters of public concern would "normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern." (A-15).

II. BY ADOPTING A POLICY, PRACTICE AND CUSTOM PERMITTING TEACHER EXPRESSION, RESPONDENTS HAVE CREATED, AT THE VERY LEAST, A *TINKER* FORUM IN WHICH VIEWPOINT DISCRIMINATION IS PROSCRIBED.

Respondents' contention that no forum for expression existed at Tabb High School is directly contradicted by Superintendent Staples' admission that the school system had a policy permitting teachers to place things on their bulletin boards and walls that are of personal interest and aren't necessarily curriculum-related. JA 258.[1] Indeed, the Court of Appeals acknowledged that there is an

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[1] Superintendent Staples was the Respondents' Fed. R. Civ. P. 30(b)(6) designee.

applicable unwritten policy, custom, and practice for York County teachers authorizing teachers to place materials on bulletin boards that are of personal interest. (A-5). Respondents' suggestion, therefore, that there was no "forum" because only teachers were allowed to engage in expression on bulletin boards is terminally flawed. Clearly, "[a] public forum may be created for a limited purpose *such as use by certain groups*[.]" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n. 7 (1983) (emphasis added). Likewise, assuming that a teacher's classroom wall or bulletin board is at least a venue in which the principles of *Tinker* would apply in light of a school policy permitting expression, the school was not at liberty to engage in viewpoint discrimination in that venue. *Id.*, 460 U.S. at 55; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001); *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).[2]

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[2] Contrary to Respondents' suggestion, the ruling below is not supported by *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). *Downs* held that material a teacher posted on the bulletin board could be removed by school officials because the facts showed that the bulletin board was reserved for "government speech" promoting the school district's policies on diversity and tolerance. The teacher was not entitled under the First Amendment to post materials in a place designated for government speech materials that were in opposition to the school district's policies. *Downs*, 228 F.3d at 1012. In the instant case, the classroom walls were not restricted to "government speech" and the admitted policy allowed Lee and other teachers to post materials of personal interest unrelated to the

III. LEE'S POSTINGS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Respondents claim that the Establishment Clause automatically trumps whatever First Amendment rights Lee may have in the classroom because a religious topic is involved. This argument cannot withstand scrutiny. First, Principal Zanca confirmed – by leaving up images of children praying and a poster charging students to "Pray for America" – that even the display of materials with an overt religious content did *not* constitute an endorsement or establishment of religion. Moreover, the materials Lee displayed were of a diverse nature, with a highly varied content. See Petition for Certiorari, pp. 7-8, and n. 3. All of the items posted were presented in a predominantly societal and secular (and/or historical) context, with some that included religious subject matter. The postings were wholly passive in nature. None contained explicitly (or even implicitly) doctrinaire or sectarian proclamations such as the Ten Commandments. Because they appeared in the overall context of other teachers posting different materials on their classroom walls, with only Lee posting these particular materials, they were very clearly Lee's own postings and did not suggest the imprimatur of the school. High school students are

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curriculum. (A-5). Significantly, the Court of Appeals did not rely upon or even cite the *Downs* case.

mature enough to understand that a school does not endorse or support speech that it permits on a nondiscriminatory basis. *Bender v. Williamsport Area School District*, 475 U.S. 534, 556 (1986) (Powell, J., dissenting); *Westside School District v. Mergens*, 493 U.S. 336, 350 (1990).

The fact that a few of Lee's materials included "religious" topics does not condemn them as inherently sectarian or proselytizing. Indeed, if "obviously religious content" required censorship, the inclusion of religion directly in a public school curriculum would even more so be proscribed. But, as Mr. Justice Brennan observed over fifty years ago in a case outlawing daily Bible reading in the classroom:

> The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion".... Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers.

School District of Abington Township v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring). The dangers Justice Brennan warned of are

exemplified in Principal Zanca's indiscriminate removal of the materials from Lee's classroom, particularly in light of the school's policy permitting teachers to display non-curricular materials of personal interest.

The Respondents also fail to present anything in the record suggesting that Lee sought to use the censored materials to proselytize or exhort religious observance, or that he intended to endorse religion. The removed materials related to secular events with a religious angle. Three of the removed items were news articles by independent newspapers and news services that simply reported upon secular events having a religious content. A fourth provided additional local background information on one of the newspaper reports. None of the materials required or coerced any high school student to support or participate in religious activities or exercises. Nor did the materials proselytize on behalf of a particular religion or endorse religion generally. They simply related information on subjects otherwise permitted for display or discussion in the classroom. Absent a showing that the content of the materials proselytized or endorsed religion, or that Lee sought to do so, the decisions in *Rosenberger*, *Perry*, *Lamb's Chapel*, and *Good News* prohibit censorship solely because of religious content, particularly when, as in this case, (1) religious content of equal degree was permitted to be displayed, and (2) the school had a policy permitting teachers to display non-curricular materials of personal interest. *Good News Club*, 533

U.S. at 114; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 394; *Perry*, 460 U.S. at 46.[3]

Respondents seek to impugn Lee's motivation in posting the materials, contending that he did so "to demonstrate his own *personal* and deeply held religious faith, and his desire to witness that faith to his students." (Brief in Opposition at 10). This is a complete distortion of the record. Lee's deposition testimony was precisely to the contrary:

> Q. Do you believe that you should share your personal religious beliefs with the children in your classroom?
>
> A. You could be borderline offensive if you think I am so stupid, I know you're not calling me stupid, I don't think you are—

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[3] Even if, as Respondents argue, Lee's expression was school-sponsored speech, most Courts of Appeals addressing the issue have held, contrary to Respondents' position, that schools may not engage in viewpoint discrimination as to school-sponsored speech. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc); *Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989); *Contra Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002).

> Q. I'm not.
>
> A. --as to endorse a religion in my classroom. I know that it's illegal. I don't know a licensed teacher who thinks otherwise.

JA 97-98.

Lee was also asked about an item that Zanca removed from his walls, and this exchange occurred:

> Q. . . . . You have a deep seated personal faith or belief, correct?
>
> A. Yes, I do.
>
> Q. And, if I hear you correctly, you find this uplifting because it reflects your personal faith.
>
> A. I certainly did not say anything like that. *If you'll take a look at that it doesn't reflect the detail of my faith at all. It doesn't endorse, it doesn't invite a kid to worship.*

JA 52 (emphasis added). Thereafter, the following exchange took place:

> Q. And is it your testimony that at least part of the reason for you

> including [the removed materials], is not to convey your pride in being a member of a deep seated religious belief?
>
> A. Like you say, we could dance all you want to, *but I didn't put those things up to endorse my faith.* They're interesting to me and I find no reason, including at this moment, to be ashamed of it, relative to all of the others.

JA 77 (emphasis added).

Far from Lee seeking to proselytize, it was Principal Zanca's decision to leave up images of children praying and a poster charging observers to "Pray for America" that represents the gravamen of the error in this case. In doing so, Zanca engaged in standardless thought policing by, on the one hand, censoring materials based on their "obviously religious content" but, on the other hand, permitting the display of materials (with equally obvious religious content) based on his own personal predilections and worries over the viewpoint of the military community whose children populated the schools. In light of an affirmative school policy, practice, and custom permitting teachers to post non-curricular materials of personal interest on classroom walls, the distinctions drawn by Principal Zanca were

arbitrary, unreasonable, and discriminatory and cannot be justified under the Establishment Clause.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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